TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 63

KATHERINE C. ROE, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF WILLIAM A. SMITH, ATTORNEY GENERAL; LINCOLN AND LEE UNIVERSITY OF KANSAS CITY, ET AL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS

FILED FEBRUARY 7, 1938

(33,203)

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[fol. 1] **IN SUPREME COURT OF KANSAS**

No. 27994

THE STATE OF KANSAS ex Rel. THE ATTORNEY GENERAL, Appellee,

vs.

(JOHN W. KEMP) KATHERINE C. ROE et al., Appellants, and Lincoln and Lee University of Kansas City, a Corporation, Appellee

STIPULATION RE TRANSCRIPT OF RECORD—Filed Jan. 31, 1928

It is stipulated by the parties hereto that the following portions of the record in the above entitled case shall constitute the transcript of the record on writ of error, and the clerk of the Supreme Court of Kansas is requested to transmit to the Clerk of the Supreme Court of the United States only the papers and portions of the abstracts designated below, the same being sufficient to show the errors complained of, to-wit:

1. Chapter 26, Art. 3, R. S. of Kansas, 1923.
   Abst. p. 2, 3, and first paragraph p. 4. (Omit R. R. Condemnation Statute.)

2. House Joint Resolution No. 1, Kansas Legislature, 1927.
   Add to heading "(Chapter 205, Laws of Kansas, 1927)." Abstract pp. 10 and 11. (Omit certification on page 12.)

3. House Bill No. 642 (Laws of Kansas, 1927, Chap. 71). Abstract, pp. 12, 13, 14, and 15. (Omit section 10, and certification, p. 16.)

4. Petition.
   Abst. pp. 17, 18 except par. VI, subdivisions 1 and 2; p. 19; p. 20 except subdivisions 5 and 6; p. 21 except praecipe for summons.

5. Order Appointing Appraisers.

Abstract pp. 23; 24 except "Tract No. 1 and Tract No. 2"; p. 25 beginning with words "Tract No. 3"; p. 26 and p. 27.

6. Report of Appraisers.

Abstract pp. 28 and 29. (Omit Oath, p. 30.)

7. Separate Answer of Katherine C. Roe.

First 8 paragraphs. Abstract pp. 30, 31, 32, 33, 34, 35 and 36 down to paragraph 9; omit paragraph 9 and balance of this document, but resume with paragraph 9 on p. 41; p. 42 down to par. 11; omit paragraph 11; print par. 12; omit par. 13, p. 43; omit paragraphs 14 and 15, p. 44; print paragraphs 16 and 17 p. 44; pp. 45, 46, 47, 48, and 49 down to Answer of Lincoln and Lee University.

8. Answer of Lincoln & Lee University.

Abstract pp. 49, 50, 51, 52, and 53.

[fol. 2] 9. Reply.

Do not print, but insert the following statement: "Plaintiff filed replies to all answers, consisting of general denials, on April 7th, 1927." Abstract p. 55.

10. Proceedings at Hearing Beginning April 11th, 1927, as follows:

Abstract p. 61; first 10 lines of page 62; omit first four lines, page 63, print balance of page; all of page 64, except last three lines; omit first 15 lines, page 65, print lines 16 and 17, omit balance of 65; omit pages 66, 67, 68, 69, 70, 71; omit first 10 lines p. 72, print next 9 lines, and omit balance of page.

11. Journal Entry.

Abstract p. 116; 117; 118; 119; 120; 121; 122; 123; 124; 125; 126; 127, but omit lines 4 to 17 inclusive.

12. Motion to Set Aside Finding (by plaintiff).

Abst. pp. 128 & 129.

13. Motion for a New Trial (Katherine C. Roe).

Abst. p. 131.

14. Journal Entry—Findings of Fact, and conclusions of law of trial Court.

State's Abst. p. 33, last 4 lines only page 34, down to findings of fact, omit findings of fact Nos. 1 & 2; page 35, print findings of fact 3, 4 and 7, and omit findings of fact 5, 6 & 8; p. 36, omit finding of of fact 9, print remainder of page; p. 37, omit findings of fact 13, 14, 16 and 18, but print findings of fact 15 & 17; p. 38, omit findings of fact 19 and 21, print remainder of page; p. 39 omit 26, 27, 28, 29 & 30, print 31 and 32; p. 40; p. 41, except last 10 lines; p. 42—omit first 2 lines, print remainder of page.

15. Order of Condemnation, Tract No. 3.
State's Abst. p. 44.

16. Order of Condemnation, Tract No. 4.
State's Abst. pp. 44 & 45 down to words Journal Entry.

17. Certification to State Auditor.
State's Abst. p. 51.

18. Payment of award.
State's Abst. p. 51.

19. Demand for Possession.
State's Abst. p. 51.

20. Journal Entry.
Abst. p. 211; first 14 lines p. 212, omit balance of page; omit first 12 lines on p. 213, print remainder of page; p. 214; p. 215, first 3 lines only—omit remainder of page; p. 216, omit first 4 lines—print remainder of page; p. 217, print to end of Journal entry.

21. Order for Possession, Tract No. 3.
Abst. pp. 195 & 196.

22. Order for Possession, Tract No. 4.
Abst. p. 198.

[fol. 3] 23. Notices of Appeal.
Do not print Notices of Appeal in full but substitute following statement: "Defendants Katherine C.

Roe and Paul W. and Mary Schleicher, filed timely notices of appeal in the Supreme Court of Kansas."

24. Specifications of Error.

Abst. p. 224, Nos. 2, 8 & 9; p. 225, No. 12; p. 226, Nos. 17, 19, 20, 21 & 22; Abst. 229, Nos. 54 & 60; p. 230, No. 64.

25. Original Petition for Writ of Error with the Allowance thereof.

26. Summons and Severance with Acknowledgment of Service.

27. Copy of Supersedeas Bond and its Approval.

28. Writ of Error.

29. Assignment of Errors.

30. A copy of the Opinion of the Supreme Court of Kansas of December 10th, 1927, Affirming the Judgment of the District Court of Johnson County, Kansas.

31. A copy of Appellant's, Katherine C. Roe, Motion for a Rehearing.

32. A copy of Order denying a rehearing, January 16th, 1928.

33. Citation with acknowledgment of Service by the State, Lincoln and Lee University of Kansas City, and Paul W. and Mary Schleicher.

It is further stipulated and agreed, that if from oversight or from omission any necessary part of the record be not thus included in the transcript, or printed, that plaintiff in error has a right to print, or may be required by defendants in error to print any further or additional portions thereof.

Dated January 27th, 1928.

William A. Smith, The Attorney General of Kansas, Randal C. Harvey, Attorneys for the State of Kansas. Leslie J. Lyons, Attorney for Lincoln and Lee University of Kansas City. J. H. Brady, T. F. Railsback, Attorneys for Plaintiff in Error, Katherine C. Roe.

[fol. 4] [File endorsement omitted.]

[fol. 5] IN SUPREME COURT OF KANSAS

No. 27994

THE STATE OF KANSAS ex rel. THE ATTORNEY GENERAL, Appellees,

vs.

JOHN W. KEMP, KATHERINE C. ROE, PAUL W. SCHLEICHER et al., Appellants

Appeal From the District Court of Johnson County, Honorable G. A. Roberds, Judge

ABSTRACT of RECORD FROM DISTRICT COURT OF JOHNSON COUNTY

EXHIBITS

Statute

Condemnation of Land Possessing Historical Interest

Chap. 26, Art. 3, R. S. 1923

26-301. "Authority to Condemn.—That the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest. Such land may be taken for the use and benefit of the state by condemnation as herein provided.

26-302. "Condemnation Proceedings.—Whenever the Legislature shall pass a joint resolution, declaring that a specifically described tract or parcel of land is invested with unusual historical interest, the nature of which shall be described, the attorney-general shall forthwith file condemnation proceedings in the district court of the county [fol. 6] where the land is situated, in the name of the state; provided, that this state may accept and hold such property by gift or devise without any resolution.

26-303. "Assessment of Damages.—The judge of the district court in whose judicial district said land may be lo-

cated shall appoint three resident freeholders, who shall appraise the land, and file a verified report of such appraisal. All parties interested shall be notified by the sheriff, in the same manner as summons are served in civil action, of a time and place for hearing the report of the appraisers. The court shall have power to approve, disapprove, or modify the report, and in all other respects conform its proceedings under this section as near as may be to the provisions of law for the appropriation of land for the use of railway corporations.

26-304. "Order of Condemnation.—If all proceedings are regular, and in conformity with the provisions of this statute, the court shall enter an order of condemnation.

26-305. "Entry and Certification of Order.—The clerk of the district court shall, immediately after the entry of the final order, send a certified transcript of all of the proceedings to the auditor of state. Before filing, the certified transcript shall be submitted to, and approved by the attorney-general.

26-306. "Allowance and Payment of Claims.—The auditor of state shall present to the Legislature a claim or claims for the amount allowed by the appraisers and approved by the court, together with all costs certified by the clerk of the court, and the claim or claims so presented shall be allowed and paid in pursuance to an appropriation made by the Legislature: Provided further, that the Legislature may specify in said resolution the maximum amount of money that may be expended for acquiring such land, and may appropriate the same or so much thereof as may be necessary for that purpose, by said resolution."

[fol. 7] "House Joint Resolution No. 1

Chap. 205, Laws of Kansas, 1927

"House Joint Resolution declaring certain land and buildings thereon, known as the Old Shawnee Mission, in Johnson County, Kansas, to possess unusual historical interest, providing for the acquirement thereof by condemnation, and the restoration and preservation of the buildings situated thereon

"Be it resolved by the House of Representatives of the State of Kansas:

"Section 1. That the following described tract of land is declared to possess unusual historical interest. All that part of the east half (½) of the southwest quarter (¼) of section three (3) in township twelve (12), range twenty-five (25), in Johnson county, Kansas, described as follows: Beginning at the northwest corner of the southeast quarter of the southwest quarter of said section three (3); thence north along the west line of the east half of said quarter section 475.4 feet; thence east at right angles to the last described course 473.85 feet; thence southeasterly along a line making a southwest angle of 94 degrees, thirteen (13) minutes and (20) seconds with the last described course 1,024.37 feet to a point which is 545.6 feet south of the line of the southeast quarter of the southwest quarter of said section three (3), measured at right angles thereto; thence west and parallel to the north line of said quarter section 548.27 feet to a point in the west line thereof, thence north 545.5 feet to the point of beginning, containing 11.97 acres.

"Section 2. That said land and the buildings standing thereon constitute the buildings and site of the Old Shawnee Mission, established by the Methodist church in the [fol. 8] year 1829. That they were the first buildings of any pretension of substantial construction built in the territory that is now Kansas. That for many years they constituted the farthest permanent outpost of western immigration. That in 1855 they became the residence of Governor Reeder and the first territorial officers; and in that year housed the first legislature of Kansas which legislature named the first permanent capital of Kansas. That they were the headquarters for early Indian campaigns, and were the center around which waged the border warfare. That this Mission was the first point in Kansas on the old Santa Fe trail, and was the mobilization center on the Oregon trail later made famous by "The Covered Wagon."

"Section 3. That said land be taken for the use and benefit of the state of Kansas by condemnation as provided by law.

"Section 4. That upon the taking over of said property by the state, the Governor shall designate the State Historical Society the custodian thereof, and he shall direct the

secretary of the State Historical Society, the state architect and one other person designated by the governor, to make a survey of said property and recommend such measures as they may deem necessary and advisable for the proper preservation and restoration of said property.

"Section 5. That this resolution shall take effect and be put in force from and after its publication in the official state paper.

House Bill No. 642

Chap. 7, Laws of Kansas, 1927

"An act making appropriation for the payment of the appraised value, damages, and court costs in the matter of the condemnation by the State of Kansas of the tract of land and buildings thereon in Johnson County, Kan- [fol. 9] sas, known as the Old Shawnee Mission, in accordance with house joint resolution No. 1, session of 1927, and making further appropriation for the restoration, improvement and maintenance of the said real estate and buildings thereon.

"Be it enacted by the Legislature of the State of Kansas:

"Section 1. There is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, the sum of $48,230, or so much thereof as may be necessary, for the purpose of paying the appraised value, damages and court costs, in the condemnation proceedings instituted under house joint resolution No. 1, session of 1927, to condemn and take for the use and benefit of the State of Kansas a certain tract of real estate in Johnson County, Kansas, known as the Old Shawnee Mission.

"Section 2. The auditor of state is hereby authorized to drawn his warrant upon the state treasury for the said amount, or so much thereof as may be necessary, upon the filing of a certified transcript of all of said proceedings by the clerk of the district court of Johnson County, Kansas, after the entry of the final order therein, said proceedings to be approved by the attorney general as pro-

vided in section 26-305 of the Revised Statutes of Kansas, 1923.

"Section 3. The amount hereinbefore appropriated shall discharge the entire liability of the State of Kansas in the acquisition of the real estate under the provisions of House joint resolution No. 1, and the condemnation proceedings instituted thereunder, and if the said amount above set out should be insufficient to pay the appraised value and court costs in said proceedings as finally certified by the court, [fol. 10] nothing herein shall create any further debt or liability on the part of the state for the difference between the amount appropriated and the amount so certified: Provided, however, that any such difference may be made up by unconditional gifts of money, the same to be deposited with the clerk of the district court, and the aggregate amount thereof certified to the state auditor, and this appropriation shall be available whenever the amount thereof, together with any such gifts or donations, is sufficient to pay the amount certified; and such gifts or donations shall be applied to the payment thereof in the same manner as the money appropriated herein.

"Section 4. Any delay in such condemnation proceedings on account of an appeal or from any cause whatever, affecting only a portion of said real estate, shall not operate to prevent the certification by the clerk of the appraised value as finally approved by the court of the remaining portions thereof, nor prevent the payment of the appraised value of such portions from moneys herein appropriated.

"Section 5. There is further appropriated, out of any moneys in the state treasury not otherwise appropriated, for the restoration, improvement and maintenance of said real estate and buildings thereon, the sum of $1,000 for the fiscal year commencing July 1, 1927, and $1,000 for the fiscal year commencing July 1, 1928. Any unexpended balance of said appropriation for the year commencing July 1, 1927, is hereby reappropriated for the same purpose for the year commencing July 1, 1928.

"Section 6. The auditor of state is directed and authorized to draw warrants upon the state treasury for the

amounts appropriated in section 5 of this act, upon veri-
[fol. 11] fied vouchers approved by the board created by section 4 of said House joint resolution No. 1

"Section 7. The said board created by Section 4 of said House joint resolution No. 1 shall have the management and control of said real estate after the same is reduced to the possession of the State of Kansas, and is authorized to do all things necessary to and consistent with the use of the same by the state, as a place of unusual historical interest. The said board, in its discretion and with the approval of the governor, may cooperate with patriotic societies in the use thereof, not inconsistent with the purpose of the state, and to that end may accept gifts of money, property or services from such organizations and apply the same to the use and benefit of the state in the preservation and improvement and furnishing of said real estate and buildings.

"Section 8. If at the time the said real estate is reduced to the possession of the State of Kansas any of the buildings thereon are occupied by any person holding a valid lease thereon from any of the former owners, the said board may, in its discretion, and with the approval of the governor, permit such tenants to remain on the said premises for the period of such lease or a part thereof, upon the payment to the State of Kansas of the same amount of rents payable under such lease to the former owners thereof; and all sums received from such rents, and any moneys received by gift, shall be deposited in the state treasury and are hereby reappropriated to the said board for the purposes herein set out.

"Section 9. All acts and parts of acts in conflict herewith are repealed.

[fol. 12] Pleadings

"Petition

"Plaintiff, for cause of action, alleges:

I

"William A. Smith is the duly elected, qualified and acting attorney general of the State of Kansas.

II

"Certain real estate, located in Johnson County, Kansas, together with the buildings and appurtenances thereon, known as the Old Shawnee Mission, is invested with unusual historical interest, the same being hereinafter described.

III

"The legislature of the State of Kansas has regularly adopted and enacted a certain resolution designated as House Joint Resolution No. 1, Session of 1927, and the same was approved by the governor, and published in the official state paper on February 10, 1927, which resolution is in words and figures as follows:

"(Here follows complete copy of House Joint Resolution No. 1, printed in full elsewhere in this abstract.)

IV

"This action is brought by the attorney-general of the State of Kansas in pursuance of said resolution and as provided by law, to condemn the said real estate.

V

"The defendants and each of them claim some interest in and to the said real estate or portions thereof, adverse to the plaintiff.

[fol. 13] "(3) Your relator verily believes that defendant Lincoln and Lee University is the owner of certain real estate in Johnson County, Kansas, described as follows:

"(Here follows description of entire Lincoln and Lee tract, as set out in deed from Miss Roe, for which see her answer.)

"And your relator verily believes that said real estate or a portion thereof is included in the real estate described in said House Joint Resolution No. 1, and that the portion of said real estate owned by defendant Lincoln and Lee Universitu consists of all the real estate last above described, which is east of the west line of east half of the

southwest quarter of section 3, township 12, range 25, in Johnson County, Kansas.

"(4) Your relator verily believes that defendant Catherine C. Roe and Katharine C. Roe is one and the same person, and is the owner of certain real estate in Johnson County, Kansas, described as follows:

"(Here follows description of entire holdings of Miss Roe 'containing in the aggregate (excluding the four (4) acres excepted) 165 acres, more or less.')

"And your relator verily believes that portion of said real estate owned by said Catherine C. Roe and Katharine C. Roe is included in the real estate described in said House Joint Resolution No. 1, and that the portion of said real estate owned by said defendant and included in the said resolution consists of all of said real estate north of the said highway, variously known as the Santa Fe trail, the Westport and Olathe road and the Mission road, except the portion owned by the said Lincoln and Lee University hereinbefore referred to.

[fol. 14] "(7) And your relator verily believes that the defendants have no other interest in said real estate, except as herein set out, and that the defendants not otherwise named have no interest whatever in said real estate.

VII

"Plaintiff further alleges that the use for which said property is to be acquired is a public use, and that plaintiff has full power and authority to condemn the same under the provisions of section 26-301 to 26-306 inclusive, of the Revised Statutes of 1923; that all things necessary to be done prior to the commencement of these proceedings have been done, and that none of the said property has been heretofore appropriated to any other public use than herein set out, save and except a certain public highway passing through said real estate, variously known as the Santa Fe trail, the Mission road and the Westport and Olathe road, all being one and the same highway, and plaintiff alleges that the taking of the real estate by this proceeding and the use thereof by the state in accordance therewith, will

not interfere in any manner whatsoever with the use of said public highway.

"Wherefore plaintiff prays that the court appoint three resident freeholders to appraise said real estate, and assess the damages (if any) sustained by the defendants by the condemnation thereof, and file a verified report of such appraisal, and that the defendants herein and all other parties interested be notified by the sheriff in the same manner as summons are served in civil action, of a time and place for hearing the report of the said appraisers, and that the court approve, disapprove or modify the said report, as equity and justice may require, and enter its final order herein accordingly, fixing the price to be paid for the said real estate, and the damages (if any) sustained by the defendants, and fixing the interest of each of the defendants in the proceeds; and that upon the payment to each of them of the amount allowed by the said appraisers, as finally approved by the court, the defendants and each of them be forever barred from claiming any right, title or interest in or to the said real estate, and that the title of the state of Kansas to the same be quieted against the defendants forever; and that the court make such other and further orders as may be necessary and proper in the premises, and in conformity with equity and justice; and that the court make such order as may be proper concerning the costs of this action.

"Petition signed by attorneys and verified by William A. Smith, attorney-general."

[fol. 15] ORDER APPOINTING APPRAISERS

"Now on this 17th day of February, 1927, this cause comes on upon plaintiff's verified petition and upon plaintiff's motion for the appointment of appraisers, and the court, having read the said verified petition and being fully advised in the premises, finds that the said appraisers should be appointed, as hereinafter provided.

"It is therefore by the court considered, ordered, adjudged and decreed that C. W. Skinner of Edgerton, Kansas, and H. C. Bigelow of Gardner, Kansas, and A. H.

Wood of Overland Park, Kansas, each of them being resident freeholders, are appointed as appraisers herein, with power and duties as hereinafter provided.

"The said appraisers shall take oath to faithfully perform their duties as such and shall receive compensation therefor in accordance with law.

"The said appraisers shall appraise and find the value according to law, of the following described real estate, together with improvements thereon, in Johnson County, Kansas, hereinafter referred to as the Shawnee Mission tract:

"(Here follows description same as in House Joint Resolution No. 1)

"The said appraisers shall also report separately the value of said real estate in four separate tracts (hereinafter designated as tracts 1, 2, 3 and 4), as follows:

"Tract 3. The portion of said real estate owned by the Lincoln and Lee University, a corporation, and described as follows:

"So much of the following described real estate in Johnson County, Kansas:

"Three and one-half ($3\frac{1}{2}$) acres in the southwest quarter of section three (3), township twelve (12), range twenty-five (25), as follows: Beginning at a point on the west line of the southeast quarter of the southwest quarter of section three (3), township twelve (12), range twenty-five (25), 1,155 feet north of the southwest corner of the southeast quarter of the southwest quarter of said section; thence north 83 degrees 2 minutes 30 seconds east, [fol. 16] 398.38 feet, this and all other courses and bearings being with reference to the west line of the southeast quarter of the southwest quarter of section three (3), as being a true north and south line; thence north 6 degrees 57 minutes 30 seconds west, 300 feet; thence south 83 degrees 2 minutes 30 seconds west, 361.77 feet; thence south 74 degrees 33 minutes 30 seconds west, 175.39 feet; thence south 16 degrees 26 minutes 40 seconds east, 289.86 feet; thence north 73 degrees 33 minutes 20 seconds east, 89.84 feet to the point of beginning.

as is included in the said Shawnee Mission tract, first herein described.

"Tract 4. The portion of said real estate owned by Catherine C. Roe or Katherine C. Roe, and being all of the said Shawnee Mission tract first above described, lying north of the center line of the public road, passing through the same, known variously as the Mission road, the Santa Fe trail and the Westport and Olathe road, save and except the portion thereof owned by the defendant Lincoln and Lee University.

"If the said appraisers shall find the portions of said real estate owned by any of said defendants are incorrectly described herein, or that any of said real estate is owned by persons other than the said defendants, they shall report separately their findings in that respect, including an appraisal of the real estate and any and all separate tracts thereof, according to the ownership. The description of said separate tracts and the ownership thereof (if otherwise than herein stated) shall be determined by said appraisers from the public records of Johnson County, Kansas, and their reports shall contain appropriate references thereto.

[fol. 17] "The said appraisers shall also appraise and find the value, according to law, of a certain mortgage on said tract number 1, owned by John W. Kemp, in favor of defendant, the Twin City State Bank of Kansas City, Kansas, and also appraise and find the value of an outstanding lease on said premises in favor of defendants, Joe Forte and Marguerite Forte, his wife, and any and all other incumbrances, mortgages, liens, options, leases or other interest in the real estate or any part thereof, as shown by the public records of Johnson County, Kansas.

"The said appraisers shall also find and assess the damages, if any, sustained or to be sustained by the defendants and each of them by the condemnation of said real estate or any part or parts thereof, as provided by law.

"In all matters not specifically provided for by this order, the said appraisers shall conduct themselves and perform their duties in accordance with the statutes of the State of Kansas applicable to this proceeding.

"The said appraisers shall make full verified report of

their appraisal to the court on or before the 11th day of April, 1927.

"It is further ordered that the report of the appraisers be set for hearing before this court in the court house at Olathe, Kansas, on the 11th day of April, 1927, at ten o'clock, a. m., and that the defendants herein and all parties interested be notified by the sheriff in the same manner as summons are served in civil action, of said time and place for the hearing of the report of the appraisers.

(Signed) G. A. Roberds, Judge."

[fol. 18] "REPORT OF APPRAISERS

"The undersigned appraisers, appointed by the court in its order of February 17, 1927, do, on our oath, submit the following report:

"Before entering upon our duties we and each of us took oath to faithfully perform the same, as provided in said order.

"Thereafter, and in accordance with said order, we did go upon, view and carefully appraise the real estate described therein, and find the value thereof by separate tracts, and as a whole, and assess the damages sustained by the owners thereof, as follows:

"Tract No. 1 (John W. Kemp): Appraised value, $20,000; damages, $—.

"Tract No. 2 (Schleichet): Appraised value, $11,750; damages, $—.

"Tract No. 3 (Lincoln and Lee University): Appraised value, $9,930; damages, $500.

"Tract No. 4 (Rose): Appraised value, $6,000; damages, $—.

"Entire Shawnee Mission tract: Appraised value, $47,680; damages, $—.

"Tract No. 1 is subject to a mortgage dated April 23, 1926, recorded May 1, 1926, in book 73 of mortgages, page 247, office of register of deeds, Johnson County, Kansas to the Twin City State Bank of Kansas City, Kansas, in the amount of $8,000, with interest as appears on such record; also to an outstanding lease to L. H. Trotter, which expires

April 9, 1931, the value of such mortgage and lease being included in, and not in addition to the value of such tract No. 1 above set out. We value the interest of Dr. L. H. Trotter in tract No. 1 at $2,500 by reason of his lease.

"Your appraisers refer to the said order appointing them for the particular description of the various tracts above referred to, and for the full names of the owners thereof; and find that such order correctly describes the four separate tracts included in said Shawnee Mission tract; and that the said four tracts, in the aggregate, include all the said Shawnee Mission tract; and that none of the defendants not herein named has any interest in, or will suffer any damages, by the condemnation of the said Shawnee Mission tract.

C. W. Skinner, H. C. Bigelow, A. M. Wood, Appraisers.

[fol. 19] Separate Answer of Defendant Katherine C. Roe—Filed March 28, 1927

"1. Answering defendant denies generally and specifically each and every allegation in the plaintiff's petition contained not herein specifically admitted or otherwise pleaded.

"2. The petition of the plaintiff fails to state facts sufficient to constitute a cause of action against the answering defendant, and fails to state facts sufficient to authorize the appointment of commissioners in condemnation for the appropriation of the defendant's property for public purposes, or facts sufficient to authorize the institution and prosecution of this proceeding.

"3. The requisite legislative action necessary to authorize the institution of proceedings in condemnation as set out in the plaintiff's petition have never timely, properly or constitutionally been taken, enacted or promulgated, and the statutory conditions precedent to the institution and maintenance of these proceedings have not occurred, been done, or happened as by law required, for which rea-

son jurisdiction to institute and maintain this suit has not been conferred upon this court.

"The legislature of the State of Kansas has never passed a proper joint resolution declaring that a properly and specifically described tract or parcel of land is invested with unusual historical interest, nor properly described the nature of such historical interest, nor properly and specifically described defendant's land, or the land embraced in these proceedings as a whole.

"4. No notice was given to answering defendant by publication or otherwise of the time when said commissioners would commence to lay off, survey, appraise and assess the land sought to be appropriated in this proceeding, nor any publication notice, or a copy thereof, inclosed in an envelope and addressed to answering defendant as the owner of the legal title to any of said land within ten days after the first publication, nor any notice in writing served upon answering defendant by the Sheriff of Johnson County, Kansas, within ten days, or at all, prior to such appraisal and assessment, nor did answering defendant waive the issuance and service of any such notice, and answering [fol. 20] defendant was given no opportunity to be present at such appraisal and condemnation and said condemnation proceedings, and all proceedings, in respect thereto and in respect to the appraisal of damages are void for lack of proper notice.

"5. Article 3 of chapter 26, Revised Statutes of the State of Kansas, 1923, is unconstitutional and void for that it is a violation of the fourteenth amendment to the constitution of the United States which provides that no state shall deprive any person of life, liberty or property without due process of law, and by said statute the State of Kansas is undertaking to deprive answering defendant of his property without due process of law; and said article 3 of said chapter 26, R. S., 1923, is unconstitutional and void because it makes no provision for a jury trial and denies the defendant the right of a trial by jury in violation of the fifth section of the bill of rights of the State of Kansas; and said article 3 of chapter 26, R. S. 1923, is unconstitutional and void and in violation of the code of civil procedure of the State of Kansas because said proceeding

involves issue of fact in a proceeding for a recovery of specific real estate which by R. S. 60-2903 must be tried to a jury unless a jury is waived, which has not been done by answering defendant.

"6. Article 3 of chapter 26 is further unconstitutional and void for that it violates the fifth amendment to the constitution of the United States wherein it is provided 'Nor shall private property be taken for public use without just compensation.'

"The State of Kansas on the relation of the attorney-general in this proceeding is attempting to take answering defendant's property for public purpose without just compensation because there has been no final order of con-[fol. 21] demnation approved by the district court in this case, nor any determination of the amount of money necessary to pay for the appropriation of said land, nor any claim filed with the Auditor of the State of Kansas in respect to the appropriation of said land, nor can any such claim be made, determination be heard, until after all due proceedings are taken in this case, and there is no sum of money available by act of the legislature of the State of Kansas to the payment of any such claim, and there has been no appropriation of any such sum, nor any determination of the amount of such an appropriation, nor can there be, until after due proceedings had in this cause to ascertain the same, and answering defendant is powerless to compel the payment of any such award, determination or claim.

"If any proper joint resolution of the Senate and House of Representatives of the State of Kansas has ever been promulgated, enacted or passed authorizing the condemnation of answering defendant's property, no law was enacted by bill appropriating the necessary sum of money to pay therefor, or make possible the payment of the proper award of damages and appraisal of values out of any general, or other funds, and said law contemplates the payment of said award by some future legislature by an appropriation bill hereafter to be enacted, which answering defendant alleges is illegal, unconstitutional and invalid, for that one legislature cannot bind a subsequent legislature to act in respect to any particular matter, and if the defendant's

lands are thus appropriated, he will be deprived of his private property for public use without just compensation, for that he will have no redress at law against the State of Kansas for the value thereof.

[fol. 22] "Answering defendant further alleges that the provisions of section 306 under said article 3 of chapter 26, being R. S. 26-306, in so far as said provisions direct the appropriation of money for the purpose of paying the amount allowed by appraisers and approved by the court by resolution, is unconstitutional and void because said provisions of said section violate section 24 of article 2 of the constitution of the State of Kansas which provides that no money shall be drawn from the treasury except in pursuance of a specific appropriation made by law, and because said provisions of said section violates section 20 of article 2 of the constitution of the State of Kansas which provides "the enacting clause of all laws shall be 'be it enacted by the legislature of the State of Kansas'; and no law shall be enacted except by bill," and therefore answering defendant alleges that the legislature of the State of Kansas is prohibited by the constitution of said state from appropriating money by resolution, and no money can be appropriated except by bill, and the provisions of said act authorize the appropriation of money by resolution, are unconstitutional and void and cannot be enforced, and thus no provision is made for compensating defendant for his private property so sought to be taken for public uses.

"7. These proceedings should be quashed and no further action taken in respect to the defendant's land for that the condemnation of said land by the terms of said article 3, chapter 26, R. S. 1923, provides that all proceedings other than those specifically enumerated shall conform as nearly as may be possible to the provisions of law for the appropriation of land for the use of railway corporations, and in respect to the appropriation of land for rail-

[fol. 23] way corporations it is provided by section 4, of article 12 of the constitution of the State of Kansas that "no right of way (lands) shall be appropriated to the use of any corporation until full compensation therefor be first made in money, or secured by a deposit of money, to the owner, irrespective of any benefit from any improvement purposed by such corporation," and defendant alleges that

said section of the constitution of the State of Kansas governs the condemnation sought to be made in this case by the adoption of the provisions of the statutes of the State of Kansas in relation to the appropriation of land for railway corporations as a part of the proceedings of condemnation of land under said article 3 of chapter 26, and full compensation for the defendant's land has not first been made in money, nor secured by a deposit of money to the owner and the plaintiff being the sovereign State of Kansas, cannot be sued by the owner nor compelled by any process to make such payment, and therefore the defendant's private property is being taken for public uses without full compensation.

"Defendant further alleges that all the provisions of said act, or other acts, embodied therein by adoption, in respect to compensation are speculative and contemplative and are not positive, definite and certain and depend upon the voluntary action of future legislatures which cannot be compelled to appropriate money to pay answering defendant for his private land so taken for public purposes.

"8. Without waiving or in any manner surrendering the rights of answering defendant on all matters hereinbefore alleged in respect to the propriety of this proceeding, or the constitutionality of any of the law under which it is [fol. 24] prosecuted, and in the event the court shall proceed to the hearing of the report of the appraisers with the intention of approving, disapproving or modifying said report as provided in R. S. 26:303, answering defendant respectfully demands a trial of her damages and of the value of her property so sought to be taken by condemnation proceedings by a jury, and demands a jury trial of all questions pertinent to be inquired into by the court in respect to the amount of such compensation to be paid the defendants prior to any action of the court whereby said report of said appraisers shall be heard, approved, disapproved or modified, and answering defendant, in respect to the compensation properly to be paid for the condemnation of said lands, respectfully shows:

"(a) The lands sought to be taken by plaintiff have not been properly and specifically described in this proceeding or in the report of said appraisers, nor have said apprais-

ers caused the same to be accurately surveyed and laid off, or otherwise bounded and designated so that answering defendant properly may ascertain and be informed as to the exact and specific lands which are sought to be so appropriated.

"(b) The amount awarded by said appraisers as the value of the lands actually taken and assessed by said appraisers as damage to the lands is insufficient, inadequate, unjust, confiscatory and does not constitute just and full compensation therefor because the same is too small and is inadequate.

[fol. 25] "9. Answering defendant is the owner of a tract of land in Johnson County, Kansas, described as follows, to-wit:

"'Commencing at a point 80 rods north of the center of section 3, township 12, range 25, in Johnson County, Kansas; thence west 160 rods; thence south on the west line of said section 3, to a point in the center of the Santa Fe trail road; thence northeasterly along the center line of the Santa Fe trail road, with the meanders thereof to a point where said center line intersects the north and south center line of said section 3; thence north to the point of beginning, containing 169 acres more or less. Said tract of land embraces the south half of the northwest quarter and the north half of the southwest quarter and a triangular strip of ground in the south half of the southwest quarter of said section 3, township 12, range 25, in Johnson County, Kansas.'

"1. The plaintiff is seeking to appropriate by virtue of these proceedings a portion of said tract of land, the exact boundaries and dimensions of which answering defendant cannot give because she had not been fully advised of the exact description of the proposed condemnation, but believes the same to be a tract of land approximately 7½ acres in extent, lying north of the road known as the Santa Fe trail road at the Old Shawnee Mission, and on which is located one of the old Shawnee Mission buildings, known as building No. 1.

"12. Answering defendant has already arranged for the platting of her entire tract of land to be sold for residence purposes under restrictions which will make it extremely

valuable for high-class and expensive dwelling houses and for a restricted residential district to which, but for the appropriation contemplated by this proceeding, it was peculiarly adapted, but on account of the appropriation of said 7½ acres thereof for public purposes making a public park within ⅛ of a mile from the corporate limits of two cities, one in Missouri and one in Kansas, and therefore beyond the police jurisdiction of those cities, and fifteen miles distant from the county seat of Johnson County, rendering policing by the sheriff practically impossible, will destroy all the value of the restrictions and residential purposes of the remaining portion of the defendant's land. Said land will become a resort for pleasure seekers, tourists, picnickers, joy riders and the like on all occasions, night and day, without police restrictions, and will materially lessen and practically destroy the value of the defendant's remaining land and the defendant will sustain damages to her remaining land in the sum of at least $1,000 per acre, or in the aggregate of $161,500.

[fol. 26] "16. Immediately east of the land herein sought to be appropriated is the mansion house of answering defendant and the appropriation by the state cuts off the westerly portion of her house, yard and garden lying west of the house. Answering defendant has beautified the land and has imported shrubs and flowers and trees from other lands and states and has planted same along the west boundary fence of her yard which is within the limits of the land being appropriated, and by such appropriation the beauty and attractiveness of her homesite is materially lessened and destroyed, and said public park about to be established by the plaintiff will lie within 150 feet of the defendant's dwelling house, and the privacy of her residence will be ruined.

"17. Furthermore, after the appropriation of said 7½ acres, the land of answering defendant will adjoin the same on the east, north and west and the value of all the land adjacent to said 7½ acres for building sites will be similarly impaired and reduced, as is the value of the defendant's own dwelling house, because of its proximity to said public work, and will be practically unsalable for residential purposes.

[fol. 27] "18. Prior to this condemnation answering defendant entered into and consummated negotiations with the Lincoln and Lee University for the erection of a portion of said university, to-wit: the natural historic department thereof upon $3\frac{1}{2}$ acres of answering defendant's land, said $3\frac{1}{2}$ acres being substantially a rectangular tract of land 300 feet wide by 500 feet in length, lying parallel and north of the road which marks the southern boundary of the $7\frac{1}{2}$ acres involved in this condemnation suit, but extended further west than said $7\frac{1}{2}$ acres by approximately 100 feet. Said university tract moreover did not extend to the east line of said $7\frac{1}{2}$ acres, but was substantially 200 feet west of said east line. Answering defendant made arrangements with the Lincoln and Lee University to convey said land to said university and consummated the same by executing a deed to the Lincoln and Lee University. Whereby, said $3\frac{1}{2}$ acres tract of land was to be improved by the beautiful university buildings thereon, and the improvement and restoration of the historical structures thereon, and by the beautification and continual maintenance and upkeep of its grounds, and said use of said $3\frac{1}{2}$ acre tract of land would have and did enhance the value of the entire remaining lands of said defendant, and by said appropriation in this proceeding said entire $3\frac{1}{2}$ acre tract has been condemned, making impossible the building of said university department of natural history thereon, and answering defendant has thus and thereby been damaged and the value of her land impaired and reduced.

"19. There is attached to this answer and made a part hereof a copy of the deed of conveyance from answering defendant to the Lincoln and Lee University, which reference is hereby made as though copied herein in full. By the terms of said deed it is provided that in the event of [fol. 28] the failure of Lincoln and Lee University to utilize said $3\frac{1}{2}$ acre tract according to the terms of said grant the title thereto shall be forfeited by Lincoln and Lee University and shall vest in the Haskell Institute of the state of Kansas by its proper and appropriate name and trustees, and because of these proceedings, which prevent Lincoln and Lee University from making use of said $3\frac{1}{2}$ acres according to the terms of said grant, answering defendant is in doubt as to her true rights, obligations and liabilities,

and as to the true status of said 3½ acres, and as to whether the proceeds of said condemnation should be paid to her or to said Lincoln and Lee University, or to the Haskell Institute, or to the three as their respective interests may appear, and thereby prays construction in connection therewith, and a decree defining said rights and forever determining the obligations, liabilities and privileges of all of said parties in respect thereto.

"Katharine C. Roe and Catherine C. Roe mentioned in the summons and notice issued in this cause are the same person as Katharine C. Roe, answering defendant herein.

"Wherefore, having fully answered, this answering defendant prays the plaintiff shall take nothing in this proceeding and that these condemnation proceedings be quashed, for naught held and of no consequence, but otherwise, in the event that they shall be held valid and subsisting, answering defendant prays judgment for her damages in this proceeding to be ascertained by jury trial in the total sum of $268,500, and for her costs in this behalf.

"J. H. Brady, T. F. Railsback, Attorneys for Defendant, Katharine C. Roe."

[fol. 29] "EXHIBIT A" TO ROE ANSWER

Kansas Warranty Deed

"This indenture, made this 31st day of January, A. D. one thousand nine hundred and twenty seven by and between Katherine C. Roe, a single woman, of Johnson County, in the State of Kansas, of the first part, and the Lincoln and Lee University, an educational institution, duly organized and existing as a corporation under the laws of the State of Missouri of the second part.

"Witnesseth: That said party of the first part, in consideration of the sum of one dollar, and the educational benefits that will accrue to the general public, the receipt of which is hereby acknowledged, does by these presents, grant, bargain, sell and convey unto the said party of the second part, and its assigns, all the following described

real estate, situated in the County of Johnson and State of Kansas, to-wit:

"Three and one-half ($3\frac{1}{2}$) acres in the southwest quarter of section three (3), township twelve (12), range twenty five (25), as follows:

"Beginning at a point on the west line of the southeast quarter of the southwest quarter of section three (3), township twelve (12), range twenty-five (25), 1.115 feet north of the southwest corner of the southeast quarter of the southwest quarter of said section; thence north 83 degrees, 2 minutes, 30 seconds east, 398.88 feet; this and all other courses and bearings being with reference to the west line of the southeast quarter of the southwest quarter of section three (3), as being a true north and south line; thence north 6 degrees 57 minutes 30 seconds west, 300 feet; [fol. 30] thence south 83 degrees, 2 minutes, 30 seconds west, 316.77 feet; thence south 73 degrees, 33 minutes, 20 seconds west, 175.39 feet; thence south 16 degrees, 26 minutes, 40 seconds east, 289.86 feet; thence north 73 degrees 33 minutes 20 seconds east, 89.84 feet, to the point of beginning.

"Subject to public highways and to all taxes now delinquent.

"The land herein is conveyed to the grantee to be used for the natural history department of the grantee and associate educational work, in the form of a museum to be developed at the earliest possible moment, and the building is to be restored, and other buildings added as the university plans develop. If any of these conditions shall not be complied with the title shall be forfeited by the grantee, and shall vest in the institution for Indians known as the Haskell Institute in the State of Kansas, whatever may be its legal name.

"To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever. And said party of the first part for her heirs, executors or administrators, do hereby covenant, promise and agree to and with said party of the second part, that at the delivery of these presents she is lawfully seized in her own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted

and described premises, with the appurtenances, that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever; and that she will warrant and for-
[fol. 31] ever defend the same unto the said party of the second part, its heirs and assigns, against said party of the first part, her heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

"In witness whereof, the said party of the first part has hereunto set her hand the day and year first above written.

"(Signed) Katherine C. Roe.

"Acknowledged before Ethel A. Whitesides, notary public, Jackson County, Missouri."

"Answer of Lincoln and Lee University

Filed March 25, 1927

"Now comes Lincoln and Lee University of Kansas City, one of the defendants herein, and for its answer to the petition heretofore filed herein respectfully states:

"1. Lincoln and Lee University of Kansas City is a corporation organized and existing under and by virtue of the laws of the State of Missouri and duly authorized and licensed to transact business in the State of Kansas.

"2. Defendant admits the allegation of paragraphs I, II, III and IV of plaintiff's petition.

"3. Defendant in answer to paragraph V states that it claims to be the owner in fee simple of all that tract of land described in sub-paragraph (3) of paragraph VI (pages 5 and 6 of Plaintiff's Petition) as hereinafter more fully stated, but this defendant is without knowledge as to the claims, ownerships or interest of the other defendants in and to any of the said tracts of real estate set forth in plaintiff's petition.

[fol. 32] "4. In answer to paragraph VI of plaintiff's petition this defendant states that it has no information

as to any of the matters set forth in sub-paragraphs (1), (2), (4), (5) and (6) and (7), and, therefore, states that it is not interested in any of the matters set forth in said sub-paragraphs.

"In answer to sub-paragraphs (3) of said paragraph VI of plaintiff's petition this defendant states the fact to be that it is the owner in fee simple of all of the real estate and property described in said sub-paragraph and holds the title thereto under and by virtue of a warranty deed, a true, full and correct copy of which is hereto attached and made a part hereof, executed on the 31st day of January, 1927, by Katharine C. Roe, a single woman, who was then the owner and in possession of said real estate and property, and delivered the possession of said real estate and property to this defendant and this defendant has ever since been in and now has the possession of all of said real estate and property; that said warranty deed was filed for record and recorded in the office of the register of deeds of Johnson County, Kansas, on the 1st day of February, 1927, in book 140, page 154, of the deed records of said county.

"Defendant states that said warranty deed is in the usual form and conveys all of said real estate and property to this defendant without restriction or conditions limiting the title of said property and contains the usual provisions as to warranty.

"Defendant further states that said deed contains the following provisions, to-wit:

'The land herein is conveyed to the grantee to be used for the natural history department of the grantee and associate educational work, in the form of a museum to be [fol. 33] developed at the earliest possible moment and the building is to be restored, and other buildings added as the university plans develop. If any of these conditions shall not be complied with the title shall be forfeited by the grantee, and shall vest in the institution for Indians known as the Haskell Institute in the State of Kansas, whatever may be its legal name.'

"Defendant states that by reason of the aforesaid provision of said deed the real estate and property described in said sub-paragraph (3) of paragraph VI of said petition is and was at the time of the passage of the act of legisla-

ture of the State of Kansas set forth in plaintiff's petition and under which the lands herein referred to are sought to be condemned, are now and will in the future be devoted to a use and purpose like and similar to the purposes contemplated under the provision of said act.

"That under said provisions of said deed and the purposes to which said real estate and property is now being put and will be used in the future the State of Kansas is without authority and power to condemn the real estate and property described in said sub-paragraph 3, and the taking thereof is in violation of the due process of law provisions of the Constitution of the State of Kansas and particularly section 18 of the bill of rights of the constitution of said state and of the Constitution of the United States and particulraly of Article V and Section 1, Article 14 of said constitution, and this defendant, therefore, denies the right of the State of Kansas to take the real estate and property of this defendant under the provisions of the act of the Legislature of the State of Kansas set forth in paragraph III of plaintiff's petition, and states that said [fol. 34] act and each of the provisions thereof in so far as it purports to give authority and power to the State of Kansas to proceed in this court to condemn the real estate and property of this defendant is unconstitutional and void and this court is, therefore, without authority and power to enter the decree and judgment or grant the relief prayed for in plaintiff's petition.

"5. Answering paragraph VII of plaintiff's petition this defendant denies that the use for which the property belonging to this defendant is to be acquired is a public use and denies that plaintiff has power and authority to condemn the same under the provisions of Section 26-301 and 26-306 inclusive, of the R. S. of 1923.

"Defendant denies each and every other allegation contained in said paragraph VII except that it admits that there is now a certain public highway passing through said real estate known as Santa Fe trail or Mission road, or as the Westport and Olathe road, all being one and the same highway.

"6. This defendant for further answer and defense states that it received and accepted the warranty deed from the

aforesaid Katharine C. Roe hereinbefore referred to in good faith and with the bona fide intention and purpose of putting said property to the uses generally described in the provisions of said deed above set out; that it entered into the possession of said property to the intention and purpose of carrying out in good faith the provisions of said deed; that it desires now to be permitted to carry out the uses and purposes of said deed and in that behalf states that it is ready, able and willing to hold and use said prop- [fol. 35] erty for the purposes set forth in said deed and that it proposes to hold and use said property for said purposes unless this court shall by its judgment and decree grant plaintiff the relief prayed for in its petition and condemn said property and take the same for the purposes of a public park as set forth in the act of the Legislature of the State of Kansas above referred to.

"Wherefore, this defendant prays that the bill be dismissed in so far as it affects or in any way relates to this defendant and its real estate and property described in said petition; that the court deny the relief prayed for by plaintiff as against this defendant and that it declare that said act of the legislature in so far as this defendant is concerned is unconstitutional, null and void, and that it grant this defendant such other further relief, orders and judgments as to the court may seem proper and just, and that it have and recover its costs.

"Leslie J. Lyons, Attorney for Defendant."

[fol. 36] "Plaintiff filed replies to all answers, consisting of general denies, on April 7th, 1927."

[fol. 37] The following proceedings were had before the court:

April 11th, 1927.

Colloquy Between Court and Counsel.

(Transcript 2, et seq.)

Mr. Harvey: If the court please, in this case as Your Honor knows, there has been a petition filed and the report

of the appraisers has been made, and the defendants who are in court I think have all filed answers. These answers raise a number of legal grounds, constitutional, and otherwise, being raised by answer and not demurrer. Our motion I presume should be considered by the court in the course of the trial and argued to the court at the time of the arguments, at the time the arguments close. There is another question, the matter of procedure, which I suppose will have to be disposed of at this time.

That is the demand in the answers of Katherine Roe, Paul Schleicher and John W. Kemp for trial by jury. That is a matter of procedure which affects this proceeding. I think that should be disposed of at this time, and then this proceeding go ahead, and all other legal considerations argued in the arguments to the court at the time the case is decided.

Mr. Railsback: The defendants, Roe and Schleicher now move the court to proceed to the trial of the issues of law raised by the petition and their separate answers, under the provisions of R. S. 60-2902 which reads as follows (reading):

"Issues of law must be tried by the court or judge unless referred. The court or judge may in his discretion hear or pass upon all considerations of law arising in the case not raised by motion or demurrer, but appearing to be involved in the case under the allegations of the pleading as well as those raised by motion or demurrer in advance of the trial of the facts and the question so decided and rulings of the court thereon should be stated in writing and filed as part of the record in the case."

The Court: Let the record show that the state appears and presented the report of the appraisers for consideration on this date and that in consideration of the same Mr. Railsback presented a motion.

[fol. 38] Mr. Railsback: For the defendants, Katherine Roe and Paul and Mary Schleicher we object to the consideration of the report. We object to its filing because:

First, lack of jurisdiction of the court to appoint the appraisers.

Second, lack of constitutional authority of the Legislature to institute by joint resolution or bill, the condemnation proceedings.

Third, because this is not a proceeding which under the Constitution of the United States or the Constitution of the State of Kansas public property may be taken for private —you may retrace there—private property may be taken for public purposes.

We urge in this objection to Your Honor's even considering this report the complete lack of authority of the Legislature of this state, by virtue of the powers vested in it by the people through the constitution, to undertake to appropriate private property for a purpose which shows on its face it is not among the classification of public uses contemplated by the General Government and by the constitution of this state, wherein a state is authorized to take private property.

I call Your Honor's attention apropos the limits of classification; this is not a health measure. Not a public welfare measure; not a public convenience measure. It has nothing to do with the development of public utilities; public business; or morals, health or welfare of the city.

[fol. 39] He has called it an esthetic measure. It is even less than that. It is purely a matter wherein the state, imbued with the idea that something ought to be preserved because of its past—not because of its present value, nor because of its future value—but it ought to be preserved because of the past.

I am objecting to the consideration of this for these reasons. I will be brief, but I want to get this in the record.

I am objecting to any proceeding on the matter at all because it is an attempt to take private property for a use which is not public, that use being one merely to preserve a relic, because of its past value, not because of its present value or future utility; and therefore falls completely outside of the constitutional or conventional definition of the words, "public uses."

And, I further object to the consideration of the appraisers' report, Your Honor, because the provisions of the law, such as it is in respect to condemnations under this historical interest statute, have not been followed.

The statute involved is Article 3 of Chapter 26 of the Laws of 1923; R. S. 1923 by that statute adopts and makes a component part of the procedure, all of the provisions of R. S. 66-2006, commonly referred to as the railroad statute, in reference to condemnations.

We specifically object because the provisions of the combined statutes, Article 3 of Chapter 26 and Chapter 66, have not been followed by the plaintiff in the case, nor in the appointment of the commissioners, nor by the commissioners.

Mr. Lyons: Lincoln and Lee University joins in the objection.

Mr. Railsback: If the Court please, I desire to take up the procedure under the 1921 law.

The Court: Let the record show objection is raised by Katherine C. Roe and Paul and Mary Schleicher and Lincoln and Lee University and John W. Kemp as to the constitutionality of the proceedings, was by the court heard and overruled.

The Court: Tomorrow, we will take up the matter of the right of this matter being heard by a court or jury.

[fol. 40] "JOURNAL ENTRY OF FINDINGS

"Now on this 11th day of April, A. D. 1927, being one of the regular judicial days of the January, 1927, term of said court this cause comes on for hearing upon the report of the appraisers, and for trial upon the issues as made up. The plaintiff appears by William A. Smith, Attorney-General, Ray H. Calihan, Assistant Attorney-General, Howard Payne, County Attorney, and Randal C. Harvey. The defendant, John W. Kemp appears by Charles B. Griffith and J. Arthur Meyers, his attorneys. The defendants, Paul Schleicher and Mary Schleicher, Katherine C. Roe, and Katherine C. Roe, executrix, appears by J. H. Brady and T. F. Railsback, their attorneys. The defendant, Lincoln and Lee University appears by Leslie J. Lyons, its attorney. The defendant, Twin City State Bank, appears by S. R. Williamson, its attorney. The defendant, Caroline A. Sutton, appears by F. L. Hagaman, her attorney.

"Thereupon L. H. Trotter appears in person and by Jerome M. Joffre, his attorney, and states that he is an interested party in this proceeding by reason of being a lessee of the real estate owned by the defendant, John W.

Kemp, as set out in the report of the appraisers, and makes application to the court that he be made a party defendant. Thereupon the plaintiff joins in said application, and, there being no objection, it is by the court ordered that L. H. Trotter be made a party defendant herein. Thereupon the said L. H. Trotter appears in person and by [fol. 41] his attorney, Jerome M. Jottre, and enters his appearance herein, and waives the service of summons and waives notice of the time and place of the hearing of the report of the appraisers, and moves that he be granted three days within which to file answer, same not to delay trial or hearing upon the report of the appraisers, and, there being no objection, it is by the court ordered that defendant, L. H. Trotter, be granted three days within which to file answer, same not to delay trial or hearing upon the report of the appraisers.

"Defendants, S. D. Scott, as trustee, and S. D. Scott, and Libbie L. Scott, his wife, having heretofore filed disclaimer, move that they recover their costs, and it is so ordered.

"Thereupon, and at ten o'clock, a. m., the report of the appraisers is presented to the court, and the plaintiff moves that the court proceed to a consideration of the same, and the exceptions thereto filed. Thereupon the defendants, John W. Kemp, Paul Schleicher and Mary Schleicher, Katherine C. Roe, and Katherine C. Roe, Executrix, and Lincoln and Lee University, object to the said report being received or considered by the court, for the reasons that these entire proceedings are invalid, and in violation of the Constitution of the United States, and of the Constitution of the State of Kansas, and for the further reason that it appears upon the face of the report and from the records of this court that said appraisers were not appointed according to law, and defendants were given no notice prior to the appointment of the appraisers, and were granted no hearing before the said appraisers (which objection appears more fully in the record). Thereupon the said de- [fol. 42] fendants, by their respective counsel, argued the said objection to the court, and counsel for plaintiff made arguments in reply thereto, and thereupon the court, after a consideration of the arguments of counsel, and being fully advised in the premises, finds that the said objection should

be overruled, and the said report of the appraisers received by the court, and that the court proceed to a hearing thereon as provided by law, and it is so ordered.

"Thereupon the defendants and each of them move that the court hear and pass upon all questions of law arising in the case, in advance of the trial of the facts, in accordance with section 60.2902, R. S. 1923, and the court finds that such motion should be sustained; and the court thereupon proceeds to hear the said questions of law, and the same are fully argued by counsel, and the court, after hearing said arguments and being fully advised in the premises, finds that the said questions of law should be determined in favor of the plaintiff, and against the defendants (with the exception of certain questions reserved for further consideration, as hereinafter set out), and makes conclusions of law as follows, to wit:

CONCLUSIONS OF LAW

I

"The petition of plaintiff states facts sufficient to constitute a cause of action against defendants, and to authorize the appointment of appraisers.

II

"House Joint Resolution No. 1, Legislature of 1927, constitutes the requisite legislative action necessary to authorize the institution of these proceedings, under the provisions of Section 26.301 to 26.306 R. S. 1923.

[fol. 43] III

"No notice is required by law to be given to defendants of the time when the appraisers will meet to appraise the land in question; and defendants' constitutional rights are not invaded by the failure of the statutes to provide such notice; full notice and hearing being provided upon the report of the appraisers, and defendants being given full opportunity to present their evidence upon such hearing.

IV

"Sections 26-301 to 26-306, R. S. 1923, are not in violation of the fourteenth amendment to the Constitution of the United States; nor of the fifth section of the Bill of Rights of the Constitution of the State of Kansas because no provision is made for jury trial.

V

"Sections 26-301 to 26-306, R. S. 1923, are not in violation of the Fifth Amendment to the Constitution of the United States.

VI

"Sections 26-301 to 26-306, R. S. 1923, are not unconstitutional and void because of failure to provide security for compensation, and the court finds that said sections, together with House Joint Resolution No. 1, and House Bill [fol. 44] 642, Session of 1927, provide sufficient security of compensation to defendants to satisfy constitutional requirements, upon the record in this cause as it stands at the present time.

VII

"The limit upon the appropriation provided in House Bill No. 642, constitutes no limit or restriction upon the amounts which may be allowed to defendants in the hearing upon report of the appraisers; and will not be considered by the court in any order made thereon.

VIII

"Sections 26-301 to 26-306 R. S. 1923, are not in violation of Section 24, Article 2, or Section 20, Article 2, of the Constitution of the State of Kansas.

IX

"Sections 26-301 to 26-306, R. S. 1923, are not in violation of Section 4 of Article 12, of the Constitution of the State of Kansas.

X

"The lands sought to be taken are sufficiently described in the petition, order appointing appraisers, and report of appraisers to comply with all statutory or constitutional requirements.

XI

"The purpose for which the property is to be taken is a public purpose; the nature of the historical interest is sufficiently described in House Joint Resolution No. 1; and Sections 26-301 to 26-306, R. S. 1923, is not in violation of [fol. 45] Section 8, Article 11, Constitution of the State of Kansas.

XII

"The property of an educational institution is subject to condemnation by the state.

"The court reserves for further consideration the question of whether defendants are entitled to a trial by jury upon the hearing on the report of the appraisers; and whether such hearing shall be held upon the report as a whole or upon the interest of each party separately; and other questions of procedure not decided as above set out.

"Thereupon, the hour of five o'clock p. m. having arrived, the hearing upon the report of the appraisers is adjourned until Tuesday, the 12th day of April, A. D. 1926, at ten o'clock a. m.

G. A. Roberds, Judge."

"Journal Entries

"Now on this 12th day of April, A. D., 1927, being one of the regular judicial days of the January, 1927, term of said court, this cause comes on pursuant to adjournment upon the hearing of the report of the appraisers; all parties appearing as before.

"Thereupon defendants, Paul Schleicher and Mary Schleicher, Katherine Roe, John W. Kemp, and Lincoln

and Lee University move that said cause proceed to trial before a jury, and that a separate jury trial be had before separate juries of the interest of each of said defendants, separately; which motion is argued by counsel, and the court, after hearing such arguments and being fully advised in the premises, overrules said motion.

[fol. 46] "Thereupon the court orders that the cause proceed to trial before the court, and that a jury be called to assist the court in the determination of issues of fact, and to render a special verdict upon such matters as may be submitted to it, subject to the power of the court to discharge the jury or to disapprove its findings, and to make separate findings of fact; and the court expressly reserves the power, after full hearing upon the report of the appraisers, to approve, disapprove, or modify said report as provided by law.

"Thereupon, the hour of five o'clock having arrived, the said cause is adjourned until Wednesday, the 13th day of April, 1927, at ten o'clock a. m.

G. A. Roberds, Judge."

"Journal Entry—April 13, 14, 15, 1927

"And now on this 13th day of April, 1927, said cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and the defendant Lincoln and Lee University also appearing by Burr Tarrant, its attorney. Thereupon twelve good and lawful men of said county, having the qualifications of jurors, were examined, empaneled and sworn, according to law, to try the issues that may be submitted to them in this cause, and render a special verdict thereon. Thereupon the hour of adjournment having arrived, the hearing of said cause upon the report of the appraisers was adjourned until Thursday, April 14, 1927, at 9 o'clock a. m.

"And now on this 14th day of April, 1927, said cause comes on for hearing upon the report of the appraisers, [fol. 47] pursuant to adjournment, the parties appearing as before, and thereupon counsel for plaintiff made opening statement, and counsel for each of defendants made opening statements. Thereupon the plaintiff produced its evidence, and the hour of adjournment being reached before

the completion of plaintiff's evidence, the said hearing upon the report of the appraisers was by the court adjourned until Friday, April 15, 1927, at 9 o'clock a. m.

"And now on this 15th day of April, 1927, this cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and thereupon the plaintiff proceeded with the production of its evidence, and the hour of adjournment being reached before the completion of plaintiff's evidence, the said hearing was by the court adjourned until Monday, April 18, 1927, at 9 o'clock a. m.

"(Signed) G. A. Roberds, Judge."

"Journal Entry

"And now on this 18th day of April, 1927, the above entitled cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and thereupon the plaintiff continues to produce its evidence and the hour of adjournment being reached, the said cause is by the court adjourned until Tuesday, April 19, 1927, at nine o'clock, A. M.

"And now on this 19th day of April , 1927, the said cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and the plaintiff completes the production of its evidence and rests. Thereupon the defendant, John W. Kemp, pro- [fol. 48] duces his evidence and the hour of adjournment being reached before the completion thereof, the said cause is by the court adjourned until Wednesday, April 20, 1927, at nine o'clock, A. M.

"And now on this 20th day of April, 1927, this cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and thereupon the defendant, John W. Kemp, produces his evidence and rests, and thereupon the defendants, Paul Schleicher and Mary Schleicher, produce their evidence, and the hour of adjournment being reached before the completion thereof, the said cause is by the court adjourned until Thursday, April 21st, 1927, at nine o'clock, A. M.

"And now on this 21st day of April, 1927, the said cause comes on for hearing upon the report of the appraisers

pursuant to adjournment, the parties appearing as before, and thereupon the defendants, Paul Schleicher and Mary Schleicher, produce their evidence and rest, and thereupon the defendant, Katherine C. Roe produces her evidence and rests; and thereupon the defendant Lincoln and Lee University produces its evidence, and the hour of adjournment being reached before the completion thereof, the said cause is by the court adjourned until Friday, April 22, 1927, at nine o'clock, A. M. -

"And now on this 22nd day of April, 1927, the said cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and thereupon the defendant, Lincoln and Lee University, produces its evidence and rests; and thereupon the defendant, L. H. Trotter, having heretofore filed his answer herein, [fol. 49] produces his evidence and rests. Upon motion of plaintiff it is by the court ordered that plaintiff's reply to the answers of the various defendants herein stand as its reply to the said answer of L. H. Trotter.

"Thereupon all the defendants announce that they have no further evidence to offer, and the plaintiff produced no evidence in rebuttal, and thereupon the court instructs the jury in writing, and counsel for plaintiff and each of the defendants made arguments to the jury.

"Thereupon it was stipulated in open court, all the parties present and represented agreeing thereto, that no objection be raised by any of the parties on account of the said hearing, or the trial of said cause not being completed within the January, 1927, term of said court; and it was agreed that the trial of said cause and the said hearing upon the report of the appraisers might extend into and be finally completed in the May, 1927, term of said court in the same manner as if all of the proceedings had been had in the same term, and it was further agreed that the verdict of the jury, when rendered, might be filed without prejudice to any of the rights of any of the parties to object thereto, and that final determination be had by the court at such time as the court might thereafter fix.

"Thereupon, the hour of adjournment having been reached, the said cause was adjourned until the 23rd day of April, 1927, at nine o'clock A. M.

"And now on this 23rd day of April, 1927, the said cause comes on for hearing upon the report of the appraisers, pursuant to adjournment, the parties appearing as before, and thereupon the said cause was submitted to the jury, [fol. 50] and the jury retired to their jury room to consider their verdict in charge of the bailiff who was sworn as provided by law.

"Thereafter and on the same date, the jury returned into open court with their verdict, and answer to special questions in words and figures as follows, to-wit:

In District Court of Johnson County

The State of Kansas ex Rel., Plaintiff,

vs.

John W. Kemp et al., Defendants

No. 10651

Special Verdict

1. "We, the jury, empanelled and sworn in the above entitled case, do, upon oaths, find:

"For the defendant, John W. Kemp, owner of Tract No. 1, for compensation, $21,000, for damages, none.

D. R. Hale, Foreman.

2. "For the defendants, Paul Schleicher and Mary Schleicher, owners of Tract No. 2, for compensation $15,000, for damages, none.

D. R. Hale, Foreman.

3. "For the defendant, The Lincoln and Lee University, owner of Tract No. 3, for compensation $7500.00, for damages $750.00.

D. R. Hale, Foreman.

4. "For the defendant, Katherine C. Roe, owner of Tract No. 4, for compensation, $8400.00, for damages, none.

D. R. Hale, Foreman.

5. "For the defendant, L. H. Trotter, lessee of Tract No. 1, for compensation $2760.00, for damages, none.

D. R. Hale, Foreman."

[fol. 51] "Thereupon, the said verdict was read in open court by the clerk, and the said jurors and each of them stated that the above was their verdict, and that they were satisfied therewith, and thereupon the said jury was discharged from further consideration of the cause.

"Thereupon, by order of the court, the said verdict was received and filed, and the said cause adjourned for further trial, and for further consideration by the court of the report of the appraisers until the 21st day of May at nine o'clock, A. M.

"G. A. Roberds, Judge."

Motion to Set Aside Findings

"Comes now the plaintiff and moves the court to set aside findings of the jury and each of them for the reason that the same are contrary to the evidence and not supported by the evidence, and for the further reason set out in plaintiff's motion for new trial filed herein; and that complainant and findings of fact are not in writing in accordance with the evidence.

"William A. Smith, Ray H. Calhan, Howard Payne, E. M. Harvey, Randal C. Harvey, Attorneys for Plaintiff."

[fol. 52] Motion for New Trial—Filed April 25, 1927

And now comes said defendant, Katherine C. Roe and moves the court to vacate the verdict returned by the jury in this action, on the 23rd day of April, A. D., 1927, and to grant said defendant, Katherine C. Roe, a new trial of this action, for the following causes which affect materially her substantial rights, to-wit:

First. Abuse of discretion by the court.

Second. Misconduct of the jury.

Third. Misconduct of the prevailing party.

Fourth. Accident and surprise which ordinary prudence could not have guarded against.

Fifth. The defendant was not afforded a reasonable opportunity to present his evidence and be heard on the merits of the case.

Sixth. Erroneous rulings of the court.

Seventh. Erroneous instructions given by the court.

Eighth. The verdict was given under the influence of passion and prejudice.

Ninth. The verdict is in whole or in part contrary to the evidence.

Tenth. Newly discovered evidence, material for said defendant, and which she could not, with reasonable diligence, have discovered and produced at the trial.

J. H. Brady, T. F. Railsback, Attorneys for Defendant, Katherine C. Roe.

[File endorsement omitted.]

[fol. 53] JOURNAL ENTRY

Now on this 25th day of May, 1927, this cause comes on, pursuant to adjournment, the parties appearing as before, and thereupon the court, having heretofore heard arguments of counsel and being fully advised in the premises, finds that the various motions for new trial and to set aside findings previously submitted should be overruled, and it is so ordered.

Thereupon the said cause comes on for decision of the court, approving, disapproving, or modifying the report of the appraisers (the evidence thereon having previously been submitted by all parties to the court, with the assistance of a jury), and the court, after hearing arguments of counsel, and being fully advised in the premises, files his memoranda opinion in writing, which memoranda

includes findings of fact and conclusions of law; and finds that the special verdicts and findings of the jury should be modified as hereinafter set out; and the court, in the exercise of his own judgment and discretion, finds the values of the real estate herein condemned, and the damages (if any) sustained by the defendants, as follows, to wit:

Tract No. 1. Value $20,000, and no damages will be suffered by any of the defendants by the condemnation thereof.

Tract No. 2. Value $10,000, and no damages will be suffered by any of the defendants by the condemnation thereof.

Tract No. 3. Value $7,500, and in addition thereto, the defendant Lincoln and Lee University will suffer damages in the sum of $350 by the condemnation thereof.

Tract No. 4. Value $6,000, and none of the defendants will suffer any damages by the condemnation thereof.

The leasehold interest of defendant L. H. Trotter in tract No. 1 is of the value of $1,000 in addition to the value of said tract as hereinbefore set forth.

And the court further finds that the report of the appraisers should be modified as above set out, and approved as modified.

And the court makes additional findings of fact and conclusions of law as follows, to wit:

FINDINGS OF FACT

[fol. 54] III

The tract heretofore designated as tract number three, which includes about 2.65 acres of land and a large building, is owned by the defendant Lincoln and Lee University. The condemnation proceedings instituted in this action leaves a tract of land a little less than one acre in extent belonging to said defendant, which is not taken in this action.

IV

The tract heretofore designated as tract number four, which includes about four acres of land, is carved out of a tract of 168 acres of land owned by the defendant Katherine C. Rice. The only improvements included on this four acre

tract of land and on the large tract out of which it is taken, includes only highly developed pasture land, trees, and fences.

VII

All of these tracts are situated in the southwest quarter of section three, township twelve, range twenty-five and located in the northeastern part of Johnson county, Kansas. They comprise a tract of land that was at one time in the early history of this state used for a school for the Shawnee and other Indians. The buildings now remaining comprise only a portion of the large number of buildings which comprised the group then in use at the time this school was actively operated.

X

Tract number three includes the greater portion of a tract of land recently deeded by Miss Katherine C. Roe to the defendant Lincoln and Lee University, and the part condemned in this proceeding includes a large two-story brick-and-wood building which is partly occupied as the residence of a family, but which building, as to the greater portion of it, is unsuitable for occupancy by reason of its poor state of repair, and which gives every evidence of long neglect. This building, by reason of a storm which occurred many years ago, and the remaining portions of the building as the same now stand, by reason of their very apparent neglect, if unimproved in the near future by the expenditure of a considerable sum of money, would become a total wreck and loss.

XI

Tract number four at one time contained many of the buildings of this old Indian school, which have many years ago been removed, and aside from a large number of trees, has no improvements worth mentioning. Tracts number three and four are taken out of a tract of approximately 168 acres of land now owned by the defendant Katherine C. Roe. This large tract which remains lies to the east for a distance of about a quarter of a mile and to the north a distance of about one-half mile, and has never been platted or subdivided.

XII

This parcel of land sought to be taken by the state is divided by the Santa Fe Trail highway running in an east-west direction about midway of the tract, and tracts numbers one and two lie immediately south of this highway and tracts three and four immediately north of this highway. The state line is about a mile and a half east of these tracts of land. And the boundary line between Johnson and Wyandotte counties is about three-quarters of a mile north of this land. Residential additions and subdivisions, some [fol. 55] of which are unrestricted and others highly developed, restricted districts, almost completely surround these tracts of land save and except the large unplatted tract heretofore mentioned as being the property of defendant Katherine C. Roe. And the greater number of the home sites in the vicinity of these tracts are of a suburban type such as are usually found near the large cities, this tract of land being about a mile south of the city limits of Kansas City and about a mile and a half west of the city limits of Kansas City, Missouri.

XV

The laws, resolutions and appropriations enacted and made by the legislature of the state of Kansas, including sections 26-301 to 26-306, R. S. 1923, and House joint resolution number one, legislature of 1927, and House bill No. 642, legislature of 1927, relate to the tracts and properties hereinbefore mentioned, and owned by the said answering defendants. That the use for which said property is acquired is a public use.

XVII

That said tracts of land, together with the principal buildings located thereon, include a portion of what was at one time known and designated as the Old Shawnee Mission, and is invested with unusual historical interest.

XX

That the occupancy and use of tract number one, of tract number two as a residence and truck farm, of tracts three

and four as a residence and dairy farm, as the same are in present use by their respective owners, are as advantageously and profitably used and occupied by their respective owners for their respective purposes when stripped of the element of historical value as the same would be used or occupied under the added claim of historic value attached thereto; that the same are used by the respective owners and occupants because of their physical fitness with respect to the several various uses to which the same are placed and used, independent and aside from the element of any historic value that may or may not be attached thereto.

XXII

That the taking of said tracts by the state of Kansas under these proceedings will enhance and be beneficial to the remaining lands adjacent thereto, including the remaining lands of the defendants Paul and Mary Schleicher, Lincoln and Lee University, and Katherine C. Roe.

XXIII

That the present and former uses of said tracts have been and are detrimental influences upon the value of the adjacent restricted and unrestricted residential development.

XXIV

That the acquiring of these tracts of land by the state of Kansas under this proceeding will not have a demoralizing effect upon the vicinity adjacent thereto.

XXV

That the historic interest of said tracts has not materially increased the actual value thereof.

[fol. 56]

XXXI

Tract number three, owned by Lincoln and Lee University, a corporation, was deeded to it as a gift to that institution by the defendant Katherine E. Roe. The proposed campus and principal location of this university is situated five or six miles distant from the location of this tract.

XXXII

Of the tract owned by Lincoln and Lee University, practically the entire body of the land taken by this proceeding includes the better and more valuable portions of said tract. The remaining tract belonging to said university consists of a fraction of an acre which lies immediately west of the tract taken in this proceeding, through which flows a natural watercourse. The contour of this remaining fraction of an acre is very rough and has a considerable amount of outcropping rock and, with the exception of some shade trees, practically no vegetation.

XXXIII

Tract number two lies principally immediately west of tract number one, but it also includes a narrow strip of land immediately south of tract number one and immediately east of tract number one.

Conclusions of Law

I

These condemnation proceedings are supported by the constitution and the laws of the state of Kansas.

II

The legislature of the state of Kansas have adopted and passed all the necessary proceedings, resolutions and laws on which to base the proceedings instituted and put into effect in this action.

III

The plaintiff herein has complied with the legislative requirements with respect to the institution and the prosecution of these condemnation proceedings.

IV

Due and legal notice has been given defendants and each of them in the institution and prosecution of these condemnation proceedings.

V

The appointment of the appraisers by this court, the qualification of said appraisers to make appraisement, the appraisement made by said appraisers and the notice of the date of the hearing of the same by this court were all done and performed in due process of law.

VI

This court has power to approve, disapprove, or modify the report and the appraisement of the real estate sought to be condemned herein.

VII

This court has power to call to its aid and to empanel a jury to assist the court in the determination of the compensation and damages if any, to which the owners of the respective tracts of land sought to be condemned would be entitled, and to render its special verdict with respect thereto.

VIII

The several defendant owners are entitled to compensation for the property actually taken in these proceedings, based upon the fair market value of such property so taken.

[fol. 57]

IX

Defendant owners of remaining adjacent tracts are entitled to damages actually suffered to such owners in the decrease of the fair market value to any such adjacent tracts which remain and which is occasioned solely by the taking of said tracts in these proceedings.

X

The claim of the defendant Dr. L. H. Trotter, lessee of tract number one, is against the state of Kansas.

XI

The title of John W. Kemp in and to tract number one is subject to the mortgages hereinbefore mentioned.

XII

This court has power to determine and to fix the compensation and also the damages, if any, to which the owners of the respective lands sought to be condemned herein would be entitled to recover under this proceeding, and to render judgment thereon.

It is therefore by the court ordered, That the motions above referred to be and the same are overruled, and that the report of the appraisers be and the same is modified as above set out, and approved as modified. The court finds that the appraisers herein have performed their duties honestly and faithfully, and in accordance with the orders of the court, and their oath of office, and that each of said appraisers should be allowed the sum of $25 for his services as appraiser, the same to be charged as costs in the case, and that said appraisers be discharged from further duty herein, and it is so ordered.

Thereupon the plaintiff and each of the defendants above named refile their motions to set aside the findings and for a new trial, as above set out, after the decision of the court modifying the report of the appraisers as last above set out; and defendants John W. Kemp, Paul Schleicher and Mary Schleicher and Katherine C. Roe file new motions for new trial; and all of said motions are thereupon argued to the court, and after hearing arguments of counsel and being fully advised in the premises, the court finds that the same and each of them should be overruled, and it is so ordered.

[fol. 58] Thereupon the plaintiff filed its motion in writing for the condemnation of tract No. 3, and the court, after hearing arguments of counsel, and being fully advised in the premises, finds that the same should be sustained and an order of condemnation issued, and the said order of condemnation is by the court issued, as appears separately of record in this cause.

Thereupon the plaintiff filed its motion in writing for the condemnation of tract No. 4, and the court, after hearing arguments of counsel and being fully advised in the prem-

ises, finds that the same should be sustained and an order of condemnation issued, and the said order of condemnation is by the court issued, as appears separately of record in this cause.

Thereupon defendants John W. Kemp, Paul Schleicher, Mary Schleicher, Katherine C. Roe, and L. H. Trotter, and each of them produced writings in the form of appeal bonds as provided by the code of procedure before justices as for appeal from decisions of justices of the peace to the district court, each with sufficient surety in the amount of $500, and said defendants moved that an appeal be allowed them from the decision of the district court of Johnson county, Kansas, just rendered, modifying the report of the appraisers and approving the same as modified (as above set out) to the district court of Johnson county, Kansas; and that the cause be docketed as an appealed cause separately as to each appealing defendant. Plaintiff objected to such bonds and to such motion for the following reasons: (1) that no appeal will lie from a district court to the same district court, and the procedure attempted is unwarranted by the constitution or statutes of the state of Kansas; (2) that such writing purporting to be such bond is not in sufficient amount as provided by the code of procedure before justices, not being double the amount of the judgment and costs. Whereupon the said motions of said defendants were argued to the court; and after hearing such arguments and being fully advised in the premises the court finds that plaintiff's objection thereto should be sustained and such motions overruled, and it is so ordered.

It is therefore by the court considered, ordered and adjudged and decreed, That orders of condemnation issue as hereinbefore set out; that the clerk of this court certify the proceedings herein to the auditor of state, as provided by law; and that plaintiff pay the costs herein taxed at $—. The court retains jurisdiction to make appropriate orders to enforce the possession of the real estate involved; and the disposition of the proceeds thereof.

G. A. Roberds, Judge.

Order of Condemnation (Tract No. 3)

Now on this 25th day of May, 1927, this cause comes on upon plaintiff's motion for an order of condemnation of tract No. 3, and upon consideration of said motion and after hearing arguments of counsel, and being fully advised in the premises, the court finds:

(1) That all of the proceedings herein are regular and in conformity with the provisions of the statutes of the state of Kansas, and that an order of condemnation should be entered as prayed for.

(2) That the value of said tract No. 3 is $7,500 and the defendant Lincoln and Lee University of Kansas City, a corporation, will sustain damages in the amount of $350 to remaining real estate by the condemnation of such tract No. 3.

(3) That the total amount which should be required to be paid by the plaintiff, the state of Kansas, for the full title to said property and all interests therein, is the value of said real estate as heretofore found, plus the damages sustained to remaining lands, in the aggregate amount of $7,850.

To which findings Nos. 2 and 3, the plaintiff objects and excepts.

It is therefore by the court considered, ordered, adjudged and decreed, That the real estate designated and described as tract No. 3 in the order of this court of February 17, 1927, be and the same is condemned for the use and benefit of the state of Kansas, and the full title thereto is vested in the plaintiff, the state of Kansas, and its assigns forever, to have and to hold the same free and clear from all interests or claims of defendants or any of them, of any kind whatsoever, subject only to the payment by the state of Kansas to the clerk of this court of the sum of $7,850, in full payment and satisfaction of the interests of all the defendants.

It is by the court further ordered, adjudged and decreed, That upon the payment of said amount to the clerk of this

court, the said clerk shall distribute the same to the defendant herein named in accordance with the interest of said defendant as herein found, upon showing to the said clerk that the plaintiff has secured possession of said tract, either by surrender of possession by the defendant, or by process of law.

The court reserves full power and jurisdiction to make such other and further orders as may be necessary to carry this order into effect.

(Signed) G. A. Roberds, Judge.

Order of Condemnation (Tract No. 4)

Now on this 25th day of May, 1927, this cause comes on upon plaintiff's motion for an order of condemnation of tract No. 4, and upon consideration of said motion and after hearing arguments of counsel, and being fully advised in the premises, the court finds:

(1) That all of the proceedings herein are regular and in [fol. 60] conformity with the provisions of the statutes of the state of Kansas, and that an order of condemnation should be entered as prayed for.

(2) That prior to the condemnation of such real estate, by the state of Kansas, the defendant Katherine C. Roe was the owner in fee simple of said tract No. 4.

(3) That the value of said tract No. 4 is $6,000, and no damages will be sustained by any of the defendants by the condemnation thereof.

(4) That the interest of defendant Katherine C. Roe in the proceeds of said tract No. 4 is the full value thereof.

(5) That the total amount that should be required to be paid by the plaintiff, the state of Kansas, for the full title of said tract No. 4, and of all interests therein, is the value of said real estate as herein found, in the amount of $6,000.

To which findings, Nos. 3 and 5, plaintiff objects and excepts.

It is therefore by the court considered, ordered, adjudged and decreed, That the real estate designated and described as tract No. 4, in the order of this court of February 17,

1927, be and the same is condemned for the use and benefit of the state of Kansas, and the full title thereto is vested in the plaintiff, the state of Kansas, and its assigns forever, to have and to hold the same free and clear from all interests or claims of defendants or any of them, of any kind whatsoever, subject only to the payment by the state of Kansas to the clerk of this court of the sum of $6,000, in full payment and satisfaction of the interest of all the defendants.

It is by the court further ordered, adjudged and decreed, That upon the payment of said amount to the clerk of this court, the said clerk shall distribute the same to the defendant herein named in accordance with the interest of said defendant as herein found, upon showing to the said clerk that the plaintiff has secured possession of said tract, either by surrender of possession by the defendant, or by process of law.

The court reserves full power and jurisdiction to make such other and further orders as may be necessary to carry this order into effect.

(Signed) G. A. Roberds, Judge.

[fol. 61] Minute Entries

Certification to State Auditor

On July 9, 1927, the clerk of the district court transmitted to the auditor of state a certified transcript of the proceedings in this cause. This transcript was approved by the attorney-general on June 11, 1927.

Payment of Award

The clerk also transmitted her separate vouchers for the value of each of the tracts and for court costs; and on June 20, 1927, the state auditor paid to the clerk of the district court the full amount of such awards and the court costs certified.

Demand for Possession

On June 21, 1927, the state made demand for possession of each of the tracts of real estate involved, upon each of

the interested defendants. This demand recited the fact of the payment of the awards, and that the money was available for the defendants whenever they vacated the property, and also stated that, if desired, arrangements might be made with the Shawnee Mission board for a reasonable time to remove persons and property. This demand was refused by defendants Paul Schleicher, Mary Schleicher and Katherine C. Roe. Defendant Lincoln and Lee University accepted the demand and agreed to comply with it.

[fol. 62] JOURNAL ENTRY OF DECREE—July 18, 1927

"Now on this 18th day of July, 1927, being one of the regular judicial days of the May, 1927, term of said court, this cause comes on for hearing upon the motions hereinafter referred to, the court having heretofore retained jurisdiction to hear and determine the same, the parties appearing as before except the defendant, John W. Kemp, who appears in person, but not by attorney, and announces in open court that his attorney will not be present but that he desires to proceed with the consideration of said motions.

"Thereupon, the defendant, Lincoln and Lee University presents its motion heretofore filed, that the proceeds of Tract No. 3, in the amount of $7,850.00 be paid by the clerk of the court to the said defendant, Lincoln and Lee University, to which motion the defendant, Katherine C. Roe objects for the reason that those proceedings are void and a nullity, as set out in her answer, and for the further reason that said defendant, Katherine C. Roe is entitled to the proceeds of said Tract No. 3, because of failure of consideration for her deed to Lincoln and Lee University, as set out in her answer on file. The plaintiff objects to the payment of said proceeds to any of the defendants until the plaintiff, the State of Kansas, has complete possession and occupancy of said Tract No. 3, and the defendant, Lincoln and Lee University consents in open court to a condition that the said proceeds be not paid until the plaintiff has such possession and occupancy. Thereupon the said motion was argued to the court by counsel, and

the court, being fully advised in the premises, finds that the said motion should be sustained, upon the condition above set out.

[fol. 63] "Thereupon the plaintiff presented its motion for an order directing the sheriff to put plaintiff in immediate possession of Tract No. 3, which motion was thereupon argued by counsel, and the court, being fully advised in the premises, finds that the said motion should be sustained. Upon the argument of said motion the defendant, Lincoln and Lee University, stated in open court, that it had agreed with the State of Kansas to vacate the said tract, and to give the State of Kansas full possession and occupancy thereof on October 1, 1927, and that its tenants therein, Klaus Klausen, and Anna Klausen, his wife, had agreed in writing to vacate said tract on said date, and that the state of Kansas might enter on, grade, fence, improve, and maintain the said tract and the buildings thereon at any time, and prior to said date. The defendant, Katherine C. Roe, through her attorneys, stated that she was not a party to any such agreement, and asserted that she was entitled to the possession of said Tract No. 3 the same as if the said deed of Lincoln and Lee University had never been executed, and objected to the consideration of the same by the court, which objection was by the [fol. 64] court overruled; and the court thereupon finds, on account of such contention of defendant, Katherine C. Roe, that an order should issue commanding the sheriff to put plaintiff into actual possession and occupancy of Tract No. 3 on October 1, 1927.

"Thereupon the plaintiff presented its motion for an order directing the sheriff to put plaintiff in immediate possession of Tract No. 4, which motion was thereupon argued by counsel, and the court, being fully advised in the premises, finds that the said motion should be sustained, and such order issued commanding the sheriff to put plaintiff into actual possession and occupancy of Tract No. 4, on the 1st day of October, 1927, and that the plaintiff should recover rents and profits of said tract since June 20, 1927, in the sum of one dollar ($1.00) the allowance of such nominal sum for rents and profits being without prejudice to the rights of any parties heretofore or hereafter entitled thereto, to recover actual rents and

profits, and not to be considered as an adjudication of the measure of such rents and profits.

"In the consideration of each of said motions of plaintiff, the court finds that the allegations thereof are true, and that plaintiff paid to the clerk of this court on June 20, 1927, the full amount of the value, damages, and court costs, of each of said tracts; and that the plaintiff became entitled to the possession thereof on said date; and the ruling upon said motions, deferring the time when the sheriff shall put plaintiff into actual possession and occupancy thereof is without prejudice to the such right; and the duly authorized officers, agents, and employees of the State of Kansas have full power, on and after June 20, 1927, to go upon, examine, and survey the said real estate, and each tract thereof, and to do all things consistent with their duties (except to dispossess the defendants prior to the dates hereinbefore set out).

[fol. 65] "It is Therefore Considered, Ordered, Adjudged and Decreed by the court, that the proceeds of Tract No. 3 be paid by the clerk of this court to the defendant Lincoln and Lee University, after October 1, 1927, and after the plaintiff, the State of Kansas, has secured full possession and occupancy of said Tract No. 3.

"It is Further Ordered, Adjudged and Decreed, that orders of this court issue, commanding the sheriff to place plaintiff, the State of Kansas, into actual possession and occupancy of Tracts 1, 2, 3 and 4, which orders appear separately of record in this court.

"It is further ordered, adjudged and decreed that plaintiff recover judgment for $1.00 against defendants, John W. Kemp and L. H. Trotter for the rents and profits of Tract No. 1, since June 20, 1927, and that said defendants pay the costs of this action as to said tract accruing since said date.

"It is Further Ordered, Adjudged and Decreed that plaintiff recover judgment for $1.00 against defendants, Paul Schleicher and Mary Schleicher for the rents and profits of Tract No. 2, since June 20, 1927, and that said defendants pay the costs of this action as to said tract accruing since said date.

"It is Further Ordered, Adjudged and Decreed that plaintiff recover judgment for $1.00 against defendant, Katherine C. Roe for the rents and profits of Tract No. 4, since June 20, 1927, and that said defendant pay the costs of this action as to said tract accruing since said date.

"It is Further Ordered, Adjudged and Decreed, that the motion of defendant, L. H. Trotter, for the payment of the value of his leasehold before the same is vacated by him, be overruled.

"It is Further Ordered, Adjudged and Decreed that the ruling of the court, heretofore set out, upon the application of defendants, John W. Kemp and L. H. Trotter, as to whether certain property is personal property or real estate, stand as a declaratory judgment of this court.

G. A. Roberds, Judge."

[fol. 66] ORDERS OF EJECTMENT

Order (Tract No. 3)

"Now on this 18th day of July, 1927, after full hearing and argument thereon, the court having sustained plaintiff's motion for an order directing the sheriff to place plaintiff in possession and occupancy of Tract No. 3, and for good cause shown:

"It is by the Court Considered, Ordered, Adjudged and Decreed, that the Sheriff of Johnson County, Kansas, on the 1st day of October, 1927, will place the plaintiff, the State of Kansas, in full possession and occupancy of the real estate designated and described as Tract No. 3, by the order of this court of February 17, 1927, and will eject therefrom the defendants herein and each of them and particularly the defendants, Lincoln and Lee University and Katherine C. Roe and all persons holding under them or acting for them.

"It is Further Ordered that the sheriff serve this order [fol. 67] upon the said defendants forthwith.

"It is Further Ordered that the provisions of this order, deferring until October 1, 1927, the time when the sheriff shall place plaintiff in possession thereof, is without prejudice to the right of plaintiff to such possession from and

after June 20, 1927; and the duly authorized officers, agents, and employees of the state of Kansas have full power, on and after June 20, 1927, to go upon, examine and survey the said real estate and the buildings thereon, and to do all things consistent with their duties, except to dispossess and eject the said defendants prior to October 1, 1927.

"It is Further Ordered that the sheriff return this order as provided by law, after the execution thereof.

G. A. Roberds, Judge."

Order (Tract No. 4)

"Now on this 18th day of July, 1927, after full hearing and argument thereon, the court having sustained plaintiff's motion for an order directing the sheriff to place plaintiff in possession and occupancy of Tract No. 4, and for good cause shown:

"It is by the Court Considered, Ordered, Adjudged and Decreed, that the sheriff of Johnson County, Kansas, on the 1st day of October, 1927, will place the plaintiff, the State of Kansas, in full possession and occupancy of the real estate designated and described as Tract No. 4, by the order of this court of February 17, 1927, and will eject therefrom the defendants herein and each of them and particularly the defendant, Katherine C. Roe and all persons holding — them or acting for them.

"It is Further Ordered that the sheriff serve this order upon the said defendant forthwith.

"It is Further Ordered that the provisions of this order, deferring until October 1, 1927, the time when the sheriff shall place plaintiff in possession thereof, is without prejudice to the right of plaintiff to such possession from and after June 20, 1927; and the duly authorized officers, agents, and employees of the State of Kansas have full power, on and after June 20, 1927, to go upon, examine and survey the said real estate and the buildings thereon, and to do all things consistent with their duties, except to dispossess and eject the said defendants prior to October 1, 1927.

"It is Further Ordered that the sheriff return this order as provided by law, after the execution thereof.

G. A. Roberds, Judge."

[fol. 68] "Defendants, Katherine C. Roe and Paul W. and Mary Schleicher, filed timely notices of appeal in the Supreme Court of Kansas."

[fol. 69] SPECIFICATIONS OF ERROR

No. 2. The district court erred in assuming jurisdiction of all the matters involved in this proceeding, because said proceeding was unconstitutional and in violation of the rights of defendants under the Constitution of the United States and the constitution of the State of Kansas.

No. 8. The court erred in holding that the plaintiff's petition states facts sufficient to constitute a cause of action against defendants and authorized the appointment of appraisers.

No. 9. The court erred in holding that House Joint Resolution No. 1, Legislature of 1927, constitutes the requisite legislative action necessary to authorize the institution of these proceedings under the provisions of Section 26-301 to 26-306 R. S., 1923.

No. 12. The court erred in holding that the provisions of Section 26-301 to 26-306 R. S., 1923, are not in violation of the Fourteenth Amendment to the Constitution of the United States; nor of the Fifth Section of the bill of rights of the Constitution of the State of Kansas, because no provision is made for a jury trial.

No. 17. The court erred in holding that the purpose for which the property is to be taken is a public use.

No. 19. The court erred in entertaining any jurisdiction in condemnation proceedings in this cause to take private property from the defendants for the State of Kansas, without there being any present or future use set out in any of said proceedings for which said property was taken, and in taking defendants' property for any use other than a present or future definitely defined and ascertained public use.

No. 20. The court erred in holding that the taking of defendants' private property by the state because of an his-

torical interest in its past, rather than for a present or future use for the public is not a violation of the defendants' constitutional rights.

No. 21. The court erred in holding that the State of Kansas has power or authority to take private property because of historical interest in the past, and not for a definitely ascertained and specified present or future public use.

No. 22. The court erred in holding that the reasons specified in House Joint Resolution No. 1 for taking the private property of the defendants is a public use.

[fols. 70 & 71] No. 54. The court erred in issuing its orders of condemnation for the defendants' property.

No. 60. The court erred in sustaining the motion of the plaintiff for orders of condemnation.

No. 64. The court erred after defendants had appealed from the judgment of the District Court of Johnson County, Kansas, in sustaining the plaintiff's motions for an order directing the sheriff to put the plaintiff in possession of Tracts No. 2, 3, and 4.

[fols. 72 & 73] IN SUPREME COURT OF KANSAS

[Title omitted]

JOURNAL ENTRY OF SUBMISSION—Nov. 3, 1927

This cause comes on to be heard upon the appeal papers and abstract of the record from the district court of Johnson County, and thereupon after oral argument by Randall Harvey for the appellee and by T. F. Railsback for the appellant said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

[fols. 74 & 75] In Supreme Court of Kansas

[Title omitted]

Journal Entry of Judgment—Dec. 10, 1927

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereof let execution issue.

[fol. 76] In Supreme Court of Kansas

[Title omitted]

Syllabus by the Court

Eminent Domain—Public Use—Preservation of Historical Interests. The statute providing that any tract of land invested with unusual historical interest may be taken for the use and benefit of the state by condemnation, specifies the use, and the use is a public use.

Appeal from Johnson District Court, Garfield A. Roberds, Judge. Opinion filed December 10, 1927. Affirmed

Joseph H. Brady and T. F. Railsback, both of Kansas City, for the appellants.

William A. Smith, attorney-general, Ray H. Calihan, assistant attorney-general, Howard Payne, county attorney, A. M. Harvey and Randal C. Harvey, both of Topeka, for the appellee the state of Kansas; Leslie J. Lyons, of Kansas City, Mo., for appellee Lincoln and Lee University.

Opinion—Filed Dec. 10, 1927

The opinion of the court was delivered by Burch, J.:

The state condemned a tract of land forming the site of the historic Shawnee Mission, in what is now Johnson county, Kansas, and certain of the landowners appeal from the judgment of condemnation.

In 1921 the legislature passed an act which reads as follows:

"That the power of eminent domain shall extend to any tract or parcel of land in the state of Kansas which possesses unusual historical interest. Such land may be taken for the use and benefit of the state by condemnation as herein provided.

"Whenever the legislature shall pass a joint resolution, declaring that a specifically described tract or parcel of land is invested with unusual historical interest, the nature of which shall be described, the attorney-general shall forthwith file condemnation proceedings in the district court of the county where the land is situated, in the name of the state: Provided, That this state may accept and hold such property by gift or devise without any resolution." (R. S. 26-301, 26-302.)

Succeeding sections provided for assessment of damages by appraisers appointed by the district court, report of the appraisers, notice to interested persons and opportunity [fol. 77] to be heard in the district court on the appraisers' report, authority of the district court to approve, disapprove or modify the report, order of condemnation, and payment of claims. In 1927 the legislature passed a joint resolution declaring the Shawnee Mission lands and buildings to be of unusual historical interest, and providing for acquiring the land and buildings by condemnation. The land was described, the nature of the historical interest was described, and sections 3 and 4 read as follows:

"That said land be taken for the use and benefit of the state of Kansas by condemnation as provided by law.

"That upon the taking over of said property by the state, the governor shall designate the state historical society the custodian thereof, and he shall direct the secretary of the state historical society, the state architect, and one other person designated by the governor, to make a survey of said property and recommend such measures as they may deem necessary and advisable for the proper preservation and restoration of said property." (Laws 1927, ch. 205.)

At the same session the legislature passed an act making an appropriation to pay the cost of condemnation, and

making a further appropriation for the restoration, improvement, and maintenance of the land and buildings. Section 7 reads as follows:

"The said board created by section 4 of said house joint resolution No. 1 shall have the management and control of said real estate after the same is reduced to the possession of the state of Kansas, and is authorized to do all things necessary to and consistent with the use of the same by the state, as a place of unusual historical interest." (Laws 1927, ch. 71.)

Pursuant to this legislation, appraisers were appointed, who made an appraisement and filed a report. Notice was given of the time and place of hearing on the report. The landowners appeared, and were heard. The court made findings of fact and stated conclusions of law, and entered an order of condemnation.

The appeal of Katherine C. Roe best discloses that which is relied on as a fundamental defect in the proceeding. The condemned land lies about one mile south of the city limits of Kansas City, Kan., and about one and one-half miles west of the city limits of Kansas City, Mo. The portion belonging to Miss Roe was taken from a tract of 165 acres bounded on the north and east by residential additions and subdivisions, some of which are highly developed and restricted districts. Her land is adapted, or is likely soon to become adapted, to similar use. She contends she is greatly interested in knowing to what precise use the con- [fol. 78] demned land is to be put; one kind of use may enhance and another kind may detract from the value of the land not taken; she, the appraisers, and the court should be informed by the statute itself what that use is to be, in order that she may be compensated for the taking; and the statute is fatally defective, in that it merely declares land of unusual historical interest may be taken for the use and benefit of the state.

The statute provides that the state may accept and hold places of unusual historical interest by gift and by devise. It may also take by condemnation, and it seems to the court the notion the state might acquire places invested with unusual historical interest for use as prison farms and insane asylums, is far-fetched. The meaning of the statute

is clear enough, that places invested with unusual historical interest may be acquired by the state by gift, devise, or condemnation, for the use and benefit of the state, as places of that character. If there were any doubt about this, the joint resolution and the appropriation act relating to acquisition of the Shawnee Mission interpret the eminent domain statute, and show what the legislative intention was. The state historical society is to be custodian of the place. On taking it over, a qualified person is to make a survey and recommend measures for proper preservation and restoration of the Mission, and all things are to be done necessary to and consistent with use of the place by the state as a place of unusual historical interest.

There is further indication that withdrawal from private ownership and acquisition by the state means the place thereby becomes a memorial of that which gave it unusual historical interest. The legislature which enacted the condemnation statute passed an act providing that counties may issue bonds for the erection of buildings, memorial arches, and other structures, construct memorial boulevards, and establish memorial parks, commemorative of the valorous achievements of men and women in various branches of service in the world war. (R. S. 73-401.) When some house or other building, or some place, becomes hallowed on account of its historical association, it is itself a memorial, if set free from the material uses incident to private ownership, and the two statutes are companion statutes, designed to perpetuate remembrance of that which ought not to be forgotten.

The court concludes the statute designates the specific use the state is to make of the places it may acquire. [fol. 79] Those who appeal contend a landowner may not be deprived of his property except for public use and in case of public necessity; that the legislature is not the final judge of public use or necessity; and that the use proposed to be made of the Shawnee Mission is not a public use justified by necessity. Authorities are cited, on the basis of which counsel say a decision is possible marking the line between what the state may take and what it may not take by exercise of the right of eminent domain. Counsel would earn the right to a monument commemorative of

their achievement if they could enable the court to render such a decision. But the affairs of men are not static. They change, even while the judicial hand is attempting to draw the line, and if a fairly serviceable universal rule were promulgated to-day, some new social need would arise to-morrow which would require a new formulation. In the opinion in the zoning ordinance case decided last year, the supreme court of the United States, speaking by Mr. Justice Sutherland, said:

"In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out-of-hand attempts to establish general rules to which future cases must be fitted." (Euclid v. Ambler Co., 272 U. S. 365, 397.)

Pursuing that method leaves the way open for progress in the law.

The state is not obliged to debate its needs with any property owner. The state determines for itself whether, in a given case, an exercise of the power of eminent domain is needful. The question is political, and the state is not obliged to provide any tribunal in which interested persons may be heard on that question. (Cooley's Constitutional Limitations, 7th ed., p. 777.) When, in the exercise of political sovereignty, the legislature resorts to eminent domain, it determines that the use to which the condemned property is to be put is a public use. When its action is challenged by the landowner, the question, "What is a public use?" is one of law. In deciding the question the court will give respectful consideration to the judgment of the legislature, and will sustain it unless it be manifestly ill founded, but the legislature's judgment is not conclusive. This brings us to the question whether use by the state of places invested with unusual historical interest is a public one.

[fol. 80] That the Shawnee Mission is a place invested with unusual historical interest is not disputed or open to dis-

pute, and the entrancing tale need not be told here. It is sufficient to say the Mission was founded by the Methodist Church as an Indian mission in 1829. Its buildings, made of brick burned on the spot, and timber cut on the banks of a near-by stream, were the first substantial habitations in a vast region now divided into populous and prosperous states. For many years the mission remained the farthest permanent outpost of western civilization, and life at the mission forms a chapter of absorbing interest, not only in the history of Kansas, but in the history of missionary methods of promoting civilization. Three of the buildings are still standing, and when legislation to acquire them was initiated, one was used as the residence of a truck gardener, another as a dairy, and another as a roadhouse. On the repeal of the Missouri Compromise and the reopening of the "irrepressible conflict" between freedom and slavery, by passage of the Kansas-Nebraska act in 1854, the first territorial governor established executive offices in one of the buildings, and other territorial officials were quartered there. After a brief session at Pawnee, the first territorial legislature adjourned to meet at the mission, and there among other notable doings, enacted the famous "bogus statutes" for the government of the territory. In the momentous struggle to make Kansas a free state, the mission was a place about which raged the warfare which gave the territory the name "bleeding Kansas." The mission was occasionally used as a military post. The Santa Fe trail passed through the mission grounds, and its junction with the Oregon trail was but a short distance from the mission. Altogether, the Shawnee Mission was so intimately connected with "the conquest of civilization" and "the ordeal of civilization" in Kansas and in the western part of the United States, that if it be fitting to maintain historical shrines, the place is worthy to be preserved as one.

When life was simple, the power of eminent domain was expended in providing for simple necessities—public buildings, public ways, and other physical indispensable things. With the advancement of civilization new needs multiply. First comes that which is natural, and afterwards that which is spiritual, and cultural needs become just as cogent as the material needs of pioneer days were. The

framers of the constitution of the state of Kansas understood this. The constitution makes it mandatory upon the legislature to encourage the promotion of intellectual and moral improvement (art. 6, § 2). A specific method of [fol. 81] encouragement is prescribed—establishment of a uniform system of common schools and schools of higher grade, embracing college and university departments. The method is not exclusive. The legislature must do that much, but it may resort to other methods perfected in the course of social progress. The end to be subserved by state promotion of intellectual and moral improvement is better citizenship; and good citizenship is inculcated by giving attention to history as history is now conceived. History is no longer a record of past events. It is an illuminating account of the expanding life of man in all its manifestations, revealing how each stage of civilization grows out of preceding stages, revealing how the past still lives in us and still dominates us, and enabling us to profit by what has gone before. So considered, history is inspirational. The Santa Fe and Oregon trails are not merely old-time routes of trade and emigration, whose furrows in the earth's crust interfered with tillage when agriculture developed along their courses; they are highways of the indomitable spirit of man in earnest and arduous quest and fired with passion of purposeful endeavor. Considered in this way, the career of man and the careers of men stir the emotions, arouse enthusiasm and awaken zeal which fuse into patriotism; and patriotism is regarded as a worthy quality of citizenship. If therefore, the Shawnee Mission, rescued from private ownership, and restored, protected, and preserved by the state, will bear tidings to this and future generations of the vicissitudes, the perplexities and the frustrations, the consecrated devotion, the dauntless bravery, and the splendid achievements denoted by the inscription on the state's great seal, "Ad astra per aspera," and will do this with a power upon the hearts and lives of men and women which will make for better citizenship, the use is a public one.

As evidence of the efficiency of historical memorials as influences affecting citizenship, the legislature had before it the work of a multitude of patriotic societies having many thousands of members. The chief aim of these or-

ganizations is to perpetuate the memory of service to country in order to develop an increasing love of country. To this end they have secured the preservation of many historic houses and other buildings and of historic places, have erected monuments commemorative of historic events, have erected statutes, and have raised commemorative tablets and other memorials. The society of the Daughters of the American Revolution undertook the marking of [fols. 82 & 83] great roadways, including the Santa Fe trail. Besides this evidence, the legislature had before it the example of the appropriation of private property for use by the United States in restoring, preserving and marking the Gettysburg battlefield. Two distinct questions were involved: first, was the proposed use a public use, and second, if the use were a public one, under what if any of its limited powers could congress make the appropriation? In the opinion of the supreme court of the United States sustaining the appropriation, it was said that valuable lessons in the art of war might be learned from an examination of the battlefield in connection with events which took place there; but the decision was based on broader ground:

"Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed

upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection." (United States v. Gettysburg Electric Ry., 160 U. S. 668, 682.)

The court concludes the legislature's determination that use by the state of places invested with unusual historic interest is a public use, was well founded in law.

There is nothing else of importance in the case. Condemnation by the state of the land deeded by Miss Roe to Lincoln and Lee University discharged performance of the condition subsequent inserted in the deed, and the university is entitled to the award of damages for that land. If this were not true, by the same deed Miss Roe disposed of the reversion, and she has no interest in the land or the condemnation money. The condemnation proceedings were regular. Contentions that rights protected by the constitution of the United States were violated have been considered, and are held to be without merit.

The judgment of the district court is affirmed.

Harvey, J., not sitting.

[fols. 84-93] Petition for rehearing, covering 10 pages, filed December 29, 1927, omitted from this print. It was denied and nothing more by order January 16, 1928.

[fol. 94] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING REHEARING—Jan. 16, 1928

Now comes on for decision the motion for a rehearing of this cause; and thereupon it is ordered that said motion for a rehearing be overruled.

[fol. 95] Certificate of D. A. Valentine, Clerk of Supreme Court of Kansas, to foregoing transcript omitted in printing.

[fol. 96] IN SUPREME COURT OF KANSAS

[Title omitted]

PETITION FOR WRIT OF ERROR AND ORDER ALLOWING SAME—Filed Jan. 26, 1928

Considering herself aggrieved by the final decision of the Supreme Court of Kansas in rendering judgment against her in the above entitled cause, the defendant and appellant, Katherine C. Roe, hereby prays a Writ of Error from the said decision and judgment, to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

And the defendant and appellant, Katherine C. Roe, asks a severance for that she has served due notice upon her co-defendants, Paul W. Schleicher and Mary Schleicher, as shown by Exhibit A, hereto attached, and made a part hereof, and they have each refused to join in this proceeding.

Assignment of Errors is filed herewith.

J. H. Brady, T. F. Railsback, Attorneys for Defendant and Appellant, Katherine C. Roe.

STATE OF KANSAS, ss:

SUPREME COURT

Let the writ of error issue upon the execution of a bond by the said Katherine C. Roe to the appellees, the State

of Kansas and Lincoln and Lee University of Kansas City, a corporation, in the sum of Two Thousand ($2,000.00) Dollars, ($2,000.00); such bond when approved to act as a supersedeas. The defendants and appellants, Paul W. Schleicher and Mary Schleicher, having refused to join Katherine C. Roe in her petition for said writ of error, a severance, pursuant to the latter's request is accordingly ordered and a right to further proceed, separately, is granted.
[fol. 97] Done at the City of Topeka in the State of Kansas, January 26th, 1928.

Witness the Honorable the Chief Justice of the Supreme Court of Kansas.

W. A. Johnston, Chief Justice of the Supreme Court of Kansas.

Attest: D. A. Valentine, Clerk of the Supreme Court of Kansas, by E. E. Clark, Deputy. (Seal Supreme Court, State of Kansas.)

[fol. 98] [File endorsement omitted.]

[fol. 99] In Supreme Court of Kansas

[Title omitted]

Summons and Severance—Filed Jan. 26, 1928

To Paul W. Schleicher and Mary Schleicher:

Dear Sir and Madam: Desiring to institute appellate proceedings in the Supreme Court of the United States to review the final decision rendered December 10th, 1927 in the above entitled cause and the decision on petition for a rehearing therein rendered on January 16th, 1928, in the above entitled cause, and you being jointly interested with me therein, I request that each of you joint with me in a petition for a writ of error on or before February 1st, 1928, or I shall prosecute such appellate proceedings alone.

Respectfully, Katherine C. Roe.

Dated January 24th, 1928.

State of Kansas,
Johnson County, ss:

The undersigned to whom the foregoing summons and severance is directed hereby accept service thereof January 24th, 1928, and we respectfully decline and refuse to join with Katherine C. Roe in a petition for a writ of error as referred to and specified in the foregoing summons and severance.

Very respectfully, Paul Schleicher, Mary Schleicher.

Dated January 24th, 1928.

[fol. 100] [File endorsement omitted.]

[fols. 101 & 102] Bond on writ of error for $2,000.00 approved; omitted in printing.

[fol. 103] In Supreme Court of Kansas

Writ of Error—Filed Jan. 26, 1928

United States of America, ss:

The President of the United States of America to the Honorable the Judges of the[1] Supreme Court of the State of Kansas, Greeting:

Because in the record, proceedings and judgment in a cause lately pending in the Supreme Court of the State of Kansas, it being the highest court of the said State in which a decision in the cause could be had, between The State of Kansas on the relation of William A. Smith, the Attorney General, Appellee, and (John W. Kemp) Katherine C. Roe, Paul W. Schleicher and Mary Schleicher, Appellants, and

[1] The writ should be directed to the judges of the court of last resort whose judgment is to be reviewed, save where the record has been remitted to and remains in the lower court, in which event the writ may be directed to the judges of the lower court as a means of getting the record. See Atherton v. Fowler, 91 U. S. 143, 146; Sioux Remedy Co. v. Cope, 235 U. S. 197, 200.

Lincoln and Lee University of Kansas City, a corporation, Appellee, No. 27994, wherein was drawn in question the [fol. 104] validity of a statute of a State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of its validity;[1] it appears that the said Katherine C. Roe (a summons and severance having been served upon her co-appellants, Paul W. Schleicher and Mary Schleicher, and severance having been ordered) is entitled to have the said judgment reviewed by the Supreme Court of the United States; and she having presented a petition for a writ of error and an assignment of errors to that end;

And we being willing that error, if any hath occurred, should be duly corrected, and full and speedy justice done to the parties aforesaid, do command you that under your seal, distinctly and openly, you send the record, proceedings and judgment aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, and that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, so that the said Supreme Court may examine and consider the same and may cause further to be done to correct the error therein, if any hath occurred, as of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable William Howard Taft, Chief Justice of the United States, the 26th day of January, in the year of our Lord one thousand nine hundred and twenty-eight.

J. D. Campbell, Clerk of the[2] District Court of the United States for the District of Kansas.

Allowed by[3] W. A. Johnston, Chief Justice of the Supreme Court of Kansas.

[File endorsement omitted.]

---

[1] If only one of these jurisdictional grounds exists in the case, strike out the other.

[2] The writ may be allowed by the chief justice or presiding judge of the state court whose judgment is to be reviewed or a justice of the Supreme Court of the United States.

[3] The writ may be signed and issued by the clerk of the district court of the United States for that district or the clerk of the Supreme Court of the United States.

[fol. 105] IN SUPREME COURT OF KANSAS

[Title omitted]

No. 27994

ASSIGNMENT OF ERRORS—Filed Jan. 26, 1928

Now comes the above defendant and appellant, Katherine C. Roe, a severance having been ordered as to the defendants and appellants Paul W. Schleicher and Mary Schleicher, and a right further to proceed having been granted, and files herewith her petition for a writ of error, and says that there are errors in the records and proceedings of the above entitled case, and for the purpose of having the same reviewed in the Supreme Court of the United States makes the following assignment of errors:

The Supreme Court of Kansas erred in holding and deciding that Chapter 26, Article 3, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of Kansas 1921; and House Joint Resolution No. 1 of the Legislature of the State of Kansas 1927, being Chapter 205 of the Session Laws of Kansas 1927; and Chapter 71 of the Laws of Kansas 1927 are valid. The validity of said statutes and of said House Joint Resolution was denied and drawn in question by the defendant and appellant, Katherine C. Roe, on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof. The said errors are more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding—

First. That said Article 3 of Chapter 26, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of [fol. 106] Kansas 1921; and said House Joint Resolution No. 1, being chapter 205 of the laws of Kansas 1927; and said chapter 71 of the laws of Kansas, 1927, did not abridge the privileges and immunities of citizens or of this defendant and appellant, Katherine C. Roe, as guaranteed by the 14th Amendment to the Constitution of the United States.

Second. That the taking of private property by condemnation proceedings under and by virtue of the provisions

of Article 3, chapter 26, Revised Statutes of Kansas, 1923, being chapter 271 of the laws of Kansas, 1921; and under the provisions of House Joint Resolution No. 1, of the Legislature of Kansas, 1927, being chapter 205 of the laws of Kansas, 1927; and under the provisions of chapter 71 of the laws of Kansas, 1927, constitutes the taking of private property by the State of Kansas for a public use, and is due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

Third. That said Article 3 of Chapter 26, Revised Statutes of Kansas, 1923, being Chapter 271 Laws of Kansas, 1921; and or House Joint Resolution No. 1, Kansas Legislature, 1927; and or Chapter 71 of the Laws of Kansas, 1927, specifies the use for which private property is taken by condemnation proceedings, and that the use so specified is a public use.

Fourth. That the condemnation of private property, including that of defendant and appellant, Katherine C. Roe, by the State of Kansas by virtue of House Joint Resolution No. 1, Legislature of Kansas, 1927, being Chapter 205, Laws of Kansas, 1927, and the action instituted in the District Court of Johnson County, Kansas, entitled "The State of Kansas, ex rel. the Attorney General, plaintiff, vs. John W. Kemp, Katherine C. Roe, et al., defendants, No. 10651, and the further proceedings in said cause on appeal to this court in this cause, under and by virtue of the provisions of Article 3 of Chapter 26, Revised Statutes of Kansas, 1923, being Chapter 271, Laws of Kansas 1921, constituted due process of law, within the meaning of the 14th Amendment to the Constitution of the United States, and a proper exercise of the power of eminent domain by the State of Kansas, and a taking of private property for a specified use, and that such use was a public use.

[fol. 107] Fifth. That the contentions of the defendant and appellant, Katherine C. Roe, that rights protected by the Constitution of the United States were violated, are held to be without merit.

Sixth. That the Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Johnson County, Kansas, in said cause No. 10651, entitled

State of Kansas ex rel. William A. Smith, Attorney General, vs. John W. Kemp, Katherine C. Roe, et al.

Seventh. The Supreme Court of Kansas erred in denying the petition and motion of defendant and appellant, Katherine C. Roe, for a rehearing.

Eighth. The Supreme Court of the State of Kansas erred in holding and deciding that Article 3 of Chapter 26, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of Kansas 1921, is valid and does not violate the 14th Amendment to the Federal Constitution and constitutes due process of law in the taking of private property by the state by condemnation proceedings.

Nine. The Supreme Court of Kansas erred in holding and deciding that House Joint Resolution No. 1 of the Legislature of Kansas 1927, being Chapter 205 of the Laws of Kansas 1927, is a valid exercise of the power of eminent domain by the State and a sufficient authority for the exercise of power of eminent domain by the State and specifies a use which is public for which private property may be taken by the State by condemnation proceedings.

For which errors the defendant and appellant, Katherine C. Roe, prays that the said judgment and decision of the Supreme Court of the State of Kansas, dated December 10th, 1927, and its said judgment and decision denying the defendant and appellant a rehearing, dated January 16, 1928, be reversed and a judgment rendered in favor of the defendant and appellant, Katherine C. Roe, and for costs.

J. H. Brady, T. F. Railsback, Attorneys for Defendant and Appellant, Katherine C. Roe. J. H. Brady, T. F. Railsback.

[fol. 108] [File endorsement omitted.]

[fols. 109-120] Citations, in usual form, showing service on Wm. A. Smith et al., omitted in printing.

[fol. 121] Certificate of lodgment omitted in printing.

[fols. 122 & 123] Return to writ of error omitted in printing.

[fol. 124] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed Feb. 21, 1928

Comes now the plaintiff in error, Kathrine C. Roe and states that she relies upon the assignment of errors as shown in the transcript of record on file in this Court and expects to present the points as therein enumerated and requests that the record as certified to this Court, pursuant to stipulation therein contained, be printed as a whole.

J. H. Brady, T. F. Railsback, Counsel for Plaintiff in Error.

[fol. 125] [File endorsement omitted.]

Endorsed on cover: File No. 33,203. Kansas Supreme Court. Term No. 63. Katherine C. Roe, plaintiff in error, vs. The State of Kansas on the relation of William A. Smith, Attorney General; Lincoln and Lee University of Kansas City, et al. Filed February 7th, 1927. File No. 33,203.

[redacted]

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Bynckershoek Quaert. Jur. Pub.; b. 2, Ch. 15 40
1 Blackstone's Com., 139 40-117
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Cooley Constitutional Law, 6th Ed., Ch. 15, p. 665 89
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Dillon on Mun. Corpus., 5 Ed., Vol. 3, p. 1619, et seq. 72
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Lewis on Eminent Domain, 3rd. Ed., §371 . .
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Pierce on Am. Railroad Law, 161 . .
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2 Story, Const., §1790 117

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R. S. Kansas, 1923, §73-401 . .
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No. 63.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

KATHERINE C. ROE, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS ON THE RELATION OF WILLIAM A. SMITH, ATTORNEY GENERAL; LINCOLN AND LEE UNIVERSITY OF KANSAS CITY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PLAINTIFF IN ERROR.

I.

THE OPINION OF THE COURT BELOW.

The opinion of the Supreme Court of Kansas (R. 62) is reported in 124 Kan. 716; 261 Pac. 556. It is to be found at page 62 of the printed record.

II.

JURISDICTION.

1. The date of the judgment to be reviewed is December 10, 1927. Petition for a rehearing in the State Court was filed on the 29th of December, 1927 (R. 70) and denied without opinion January 16, 1928 (R. 71). The petition for writ of error and the order allowing the same bear date January 26, 1928 (R. 71).

2. This is a proceeding in error to review the judgment and decision of the Supreme Court of the State of Kansas, it being the highest court of the State of Kansas in which a decision in this suit could be had, where is drawn in question the validity of a Statute of the State of Kansas on the ground of its being repugnant to the constitution of the United States, and the decision is in favor of its validity.

Said statute, being Chapter 26, Article 3, Revised Statutes of Kansas 1923, Chapter 271 of the Laws of Kansas, 1921 (R. 51), provides that the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas which possesses unusual historical interest, and that such land may be taken for the use and benefit of the State by condemnation as provided in the statute. The Legislature of Kansas, 1927, undertook to condemn real property belonging to the plaintiff in error under this statute by the passage of a joint resolution declaring that said land possesses unusual historical interest, and resolving that it be condemned for the use and benefit of the State of

Kansas (R. 6). Plaintiff in error has opposed this condemnation from its inception on the ground that the statute and the legislative enactments following it are repugnant to the Fourteenth Amendment to the Constitution of the United States because she is being deprived of her property without due process of law, in that, neither said statute nor the legislative resolution nor any other proceedings taken thereunder specify or disclose the purpose or use for which said land was condemned, and does not disclose that her private property is condemned under the power of eminent domain for a public purpose.

Said statute (R. 5) provides that when the Legislature shall pass a joint resolution, *et cetera*, the Attorney General shall file condemnation proceedings in the District Court of the county wherein the land is situated and contains other provisions for appraisal and hearing. The Attorney General of Kansas instituted such proceedings by filing a petition and causing summons to issue (R. 10, *et seq.*), and in that action plaintiff in error raised the objection now here urged by her answer (R. 17, 18), and again at the trial (R. 31, *et seq.*) and finally in the Supreme Court of the State of Kansas on appeal from the District Court, of Johnson County (R. 60). The District Court of Johnson County, Kansas overruled said objections and held said statute to be not in violation of the Fourteenth Amendment to the Constitution of the United States (Conc. No. 4, R. 36), and the Supreme Court of the State of Kansas affirmed the rulings of the District Court of Johnson County, and decided said con-

tention to be without merit (R. 70) and that said statute specified the use to which said land is to be put, and that the use is a public use (R. 62).

The Supreme Court of the State of Kansas ordered and adjudged that the judgment of the court below be affirmed (R. 62), and its judgment of affirmance is a final judgment in this suit in the highest court of the State of Kansas in which a decision in the suit could be had.

3. This proceeding in error is filed under the provisions of Section 237a of the Judicial Code as amended by the Act of February 13, 1925 (U. S. Code Title 28, Sec. 344).

4. Plaintiff in error claims to have been deprived of her property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, in a condemnation proceeding carried forward under a Statute of the State of Kansas which does not provide or specify any use for which her property is taken, much less a use which clearly appears to be a public one, and the highest court of the State of Kansas in which a decision could be had has rendered a judgment in favor of the validity of said statute. It is respectfully submitted to this court for review and it is believed that

the jurisdiction of this court is sustained in this case by the following decisions:

Hairston v. *Danville Railway Co.*, 208 U. S. 598.

Yeeser v. *Washington Harbor Line Commissioners*, 146 U. S. 646.

Fall Brook Irrigation District v. *Bradley*, 164 U. S. 112.

Mo. Pac. R. Co. v. *Nebraska*, 164 U. S. 403.

Chicago, Burlington & Quincy R. R. Co. v. *Chicago*, 166 U. S. 226.

Davidson v. *New Orleans*, 96 U. S. 97.

Citizens Sav. & L. Ass'n v. *Topeka*, 87 U. S. 20 Wall. 655.

Delaware, L. & W. R. Co. v. *Morristown*, 72 L. ed. 274.

III.

STATEMENT OF THE CASE.

This is a proceeding in error to the Supreme Court of the State of Kansas to review a judgment and decision of that court rendered on the 10th day of December, 1927 affirming the judgment and decision of the District Court of Johnson County, Kansas in a condemnation proceeding instituted by the State on the relation of the Attorney General to carry out the directions of the Legislature of the State of Kansas, Session of 1927, expressed in House Joint Resolution No. 1 of that legislature, to acquire for the State approximately twelve acres of land in Johnson County, Kansas because it was said to possess unusual historical interest.

The property condemned is known as the Old Shawnee Mission (R. 6) in Johnson County, Kansas,

said to be the place in Kansas where the first buildings of any pretension of substantial construction were built, and that for many years it constituted the farthest permanent outpost of western immigration.

Prior to the condemnation, this tract of land was the subject of private ownership and one of the owners is the plaintiff in error here. The ground contained in the tract of land condemned is divided by the Santa Fe Trail Highway running east and west about midway of the tracts. There are two tracts on the south side of the road which are not involved in this appeal, and there are two tracts (spoken of as Tracts 3 and 4 in this condemnation proceeding) on the north side of the highway (R. 46), and which constitute approximately 6.65 acres of land (R. 44).

Plaintiff in error was the owner of a tract of land embracing approximately 169 acres lying north of the highway (R. 22) and the condemned land lies in the southwest corner of the entire tract facing the Santa Fe Trail Highway.

Prior to the institution of this proceeding plaintiff in error conveyed to the Lincoln and Lee University approximately three and one-half acres, being the extreme southwest corner of her holdings, to be used by that institution in accordance with a stipulation in the deed in the following language:

> "The land herein is conveyed to the grantee to be used for the natural history department of the grantee and association educational work, in the form of a museum to be developed at the earliest possible moment, and the building is to be restored, and other buildings added as the university

plans develop. If any of these conditions shall not be complied with the title shall be forfeited by the grantee, and shall vest in the institution for Indians known as the Haskell Institute in the State of Kansas, whatever may be its legal name."

This 2.65 acres out of the 3.5 acres was condemned in this proceeding as the property of the Lincoln and Lee University, and this has been referred to throughout the proceedings as Tract No. 3.

In addition to Tract No. 3, an additional four acres was carved out of plaintiff in error's remaining property adjacent to the three and one-half acre tract, and this is referred to as Tract No. 4.

Lincoln and Lee University does not join in this proceeding in error, but the entire matter is still in controversy here, because if the plaintiff in error is successful, the condemnation proceeding fails as a whole and the plaintiff in error will then be in a position to insist upon Lincoln and Lee University proceeding to use said tract of ground for the purposes intended, greatly to the advantage of plaintiff in error, who holds her entire tract for residential platting purposes (R. 64).

Thus there has been taken out of the southwest corner of her one hundred sixty-nine-acre tract, seven and one-half acres, four acres of which is condemned by the State directly from her; two and sixty-five hundredths acres is condemned by the State from Lincoln and Lee University, and the fraction of an acre remaining is still owned by Lincoln and Lee University, but is not susceptible of use by it because it cannot be put to the use for which the donation was made.

Plaintiff in error challenges the validity of the entire proceeding because it is claimed that the condemnation has the effect of taking her private property without due process of law in violation of her rights as guaranteed by the 14th Amendment to the Constitution of the United States, because no use or purpose of any kind, and it follows, no public use, is specified or disclosed by the statute or any of the legislative or judicial proceedings thereunder.

In 1921, the Legislature of Kansas enacted a law (Laws 1921, Chapter 271) which now appears in the 1923 revision of the General Statutes as Article III of Chapter 26. This statute is as follows (R. 5):

"STATUTE.

Condemnation of Land Possessing Historical Interest

Chap. 26, Art. 3, R. S. 1923.

26-301. 'Authority to Condemn.—That the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest. Such land may be taken for the use and benefit of the State by condemnation as herein provided.

26-302. 'Condemnation Proceedings.—Whenever the Legislature shall pass a joint resolution, declaring that a specifically described tract or parcel of land is invested with unusual historical interest, the nature of which shall be described, the Attorney General shall forthwith file condemnation proceedings in the district court of the county (fol. 6) where the land is situated, in the name of the State; provided, that this State may accept and

hold such property by gift or devise without any resolution.

26-303. 'Assessment of Damages.—The judge of the district court in whose judicial district said land may be located shall appoint three resident freeholders, who shall appraise the land, and file a verified report of such appraisal. All parties interested shall be notified by the sheriff, in the same manner as summons are served in civil action, of a time and place for hearing the report of the appraisers. The court shall have power to approve, disapprove or modify the report, and in all other respects conform its proceedings under this section as near as may be to the provisions of law for the appropriation of land for the use of railway corporations.

26-304. 'Order of Condemnation.—If all proceedings are regular, and in conformity with the provisions of this statute, the court shall enter an order of condemnation.

26-305. 'Entry and Certification of Order.—The clerk of the district court shall, immediately after the entry of the final order, send a certified transcript of all of the proceedings to the Auditor of State. Before filing, the certified transcript shall be submitted to, and approved by the Attorney General.

26-306. 'Allowance and Payment of Claims.—The Auditor of State shall present to the Legislature a claim or claims for the amount allowed by the appraisers and approved by the court, together with all costs certified by the clerk of the court, and the claim or claims so presented shall be allowed and paid in pursuance to an appropriation made by the Legislature: Provided, further, that the

Legislature may specify in said Resolution the maximum amount of money that may be expended for acquiring such land, and may appropriate the same or so much thereof as may be necessary for that purpose, by said Resolution.'"

In 1927 the Legislature of the State of Kansas passed a resolution to condemn the land in controversy under the provisions of the foregoing statute, said resolution being known as House Joint Resolution No. 1, Chapter 205, Laws of Kansas, 1927, and is in the following language (R. 6):

"House Joint Resolution No. 1

Chap. 205, Laws of Kansas, 1927

House Joint Resolution declaring certain land and buildings thereon, known as the Old Shawnee Mission, in Johnson County, Kansas, to possess unusual historical interest, providing for the acquirement thereof by condemnation, and the restoration and preservation of the buildings situated thereon.

Be it Resolved by the House of Representatives of the State of Kansas:

Section 1. That the following described tract of land is declared to possess unusual historical interest. All that part of the east half (½) of the southwest quarter (¼) of section three (3) in township twelve (12), range twenty-five (25), in Johnson County, Kansas, described as follows: Beginning at the northwest corner of the southeast quarter of the southwest quarter of said section three (3); thence north along the west line of the east half of said quarter section 475.4 feet;

thence east at right angles to the last described course 473.85 feet; thence southeasterly along a line making a southwest angle of 94 degrees, thirteen (13) minutes and (20) seconds with the last described course 1,024.37 feet to a point which is 545.6 feet south of the line of the southeast quarter of the southwest quarter of said section three (3), measured at right angles thereto; thence west and parallel to the north line of said quarter section 548.27 feet to a point in the west line thereof, thence north 545.5 feet to the point of beginning, containing 11.97 acres.

Section 2. That said land and the buildings standing thereon constitute the buildings and site of the Old Shawnee Mission, established by the Methodist Church in the (fol. 8) year 1829. That they were the first buildings of any pretension of substantial construction built in the territory that is now Kansas. That for many years they constituted the farthest permanent outpost of western immigration. That in 1855 they became the resident of Governor Reeder and the first territorial officers; and in that year housed the first Legislature of Kansas which legislature named the first permanent capital of Kansas. That they were the headquarters for early Indian campaigns, and were the center around which waged the border warfare. That this Mission was the first point in Kansas on the old Santa Fe Trail, and was the mobilization center on the Oregon Trail later made famous by 'The Covered Wagon.'

Section 3. That said land be taken for the use and benefit of the State of Kansas by condemnation as provided by law.

Section 4. That upon the taking over of said property by the State, the Governor shall designate

the State Historical Society the custodian thereof, and he shall direct the Secretary of the State Historical Society, the State architect and one other person designated by the Governor, to make a survey of said property and recommend such measures as they may deem necessary and advisable for the proper preservation and restoration of said property.

Section 5. That this Resolution shall take effect and be put in force from and after its publication in the official State paper."

After the passage of said Resolution and as directed therein the Attorney General instituted an action in the District Court of Johnson County, Kansas to condemn (or complete the condemnation by assessing damages) the property described in the House Joint Resolution (R. 10), and an order was made by the district judge appointing appraisers (R. 13), who filed their report fixing the appraised value of the land actually taken from all parties at $47,680 and damages to land not taken $500.00, total $48,180 (R. 16).

The legislature which inaugurated this proceeding was still in session, so that it thereafter passed House Bill No. 642, being Chapter 7 of the Laws of Kansas of 1927 appropriating $48,230, or $50.00 more than the total award, for the purpose of paying the appraised value, damages, and court costs. In addition to this the Appropriation Bill carried $2,000—$1,000 for each of the two years intervening between the end of that legislature and the next succeeding General Assembly, for the restoration, improvement and maintenance of said property (R. 9). The Appropriation Bill is as follows:

"House Bill No. 642
Chap. 7, Laws of Kansas, 1927

An act making appropriation for the payment of the appraised value, damages, and court costs in the matter of the condemnation by the State of Kansas of the tract of land and buildings thereon in Johnson County, Kansas (fol. 9), known as the Old Shawnee Mission, in accordance with House Joint Resolution No. 1, session of 1927, and making further appropriation for the restoration, improvement and maintenance of the said real estate and buildings thereon.

Be it enacted by the Legislature of the State of Kansas:

Section 1. There is hereby appropriated, out of any moneys in the state treasury not otherwise appropriated, the sum of $48,230, or so much thereof as may be necessary, for the purpose of paying the appraised value, damages and court costs, in the condemnation proceedings instituted under House Joint Resolution No. 1, session of 1927, to condemn and take for the use and benefit of the State of Kansas a certain tract of real estate in Johnson County, Kansas, known as the Old Shawnee Mission.

Section 2. The auditor of State is hereby authorized to draw his warrant upon the State treasury for the said amount, or so much thereof as may be necessary, upon the filing of a certified transcript of all of said proceedings by the clerk of the District Court of Johnson County, Kansas, after the entry of the final order therein, said proceedings to be approved by the Attorney General as provided in Section 26-305 of the Revised Statutes of Kansas, 1923.

Section 3. The amount hereinbefore appropriated shall discharge the entire liability of the State of Kansas in the acquisition of the real estate under the provisions of House Joint Resolution No. 1, and the condemnation proceedings instituted thereunder, and if the said amount above set out should be insufficient to pay the appraised value and court costs in said proceedings as finally certified by the court (fol. 10), nothing herein shall create any further debt or liability on the part of the State for the difference between the amount appropriated and the amount so certified: Provided, however, that any such difference may be made up by unconditional gifts of money, the same to be deposited with the clerk of the district court, and the aggregate amount thereof certified to the State auditor, and this appropriation shall be available whenever the amount thereof, together with any such gifts or donations, is sufficient to pay the amount certified; and such gifts or donations shall be applied to the payment thereof in the same manner as the money appropriated herein.

Section 4. Any delay in such condemnation proceedings on account of an appeal or from any cause whatever, affecting only a portion of said real estate, shall not operate to prevent the certification by the clerk of the appraised value as finally approved by the court of the remaining portions thereof, nor prevent the payment of the appraised value of such portions from moneys herein appropriated.

Section 5. There is further appropriated, out of any moneys in the State treasury not otherwise appropriated, for the restoration, improvement and maintenance of said real estate and

buildings thereon, the sum of $1,000 for the fiscal year commencing July 1, 1927, and $1,000 for the fiscal year commencing July 1, 1928. Any unexpended balance of said appropriation for the year commencing July 1, 1927, is hereby reappropriated for the same purpose for the year commencing July 1, 1928.

Section 6. The auditor of State is directed and authorized to draw warrants upon the State treasury for the amounts appropriated in Section 5 of this Act, upon verified (fol. 11) vouchers approved by the board created by Section 4 of said House Joint Resolution No. 1.

Section 7. The said board created by Section 4 of said House Joint Resolution No. 1 shall have the management and control of said real estate after the same is reduced to the possession of the State of Kansas, and is authorized to do all things necessary to and consistent with the use of the same by the State, as a place of unusual historical interest. The said board, in its discretion and with the approval of the governor, may cooperate with patriotic societies in the use thereof, not inconsistent with the purpose of the State, and to that end may accept gifts of money, property or services from such organizations and apply the same to the use and benefit of the State in the preservation and improvement and furnishing of said real estate and buildings.

Section 8. If at the time the said real estate is reduced to the possession of the State of Kansas any of the buildings thereon are occupied by any person holding a valid lease thereon from any of the former owners, the said board may, in its discretion, and with the approval of the governor,

permit such tenants to remain on the said premises for the period of such lease or a part thereof, upon the payment to the State of Kansas of the same amount of rents payable under such lease to the former owners thereof; and all sums received from such rents, and any moneys received by gift, shall be deposited in the State treasury and are hereby reappropriated to the said board for the purposes herein set out.

Section 9. All acts and parts of acts in conflict herewith are repealed."

Plaintiff in error was awarded $6,000 for the four acre tract *without damages to the remaining portion of her property;* Lincoln and Lee University was awarded $7,500 for the 2.6 acres and $350.00 damages to the remaining portion of its tract (R. 44).

Plaintiff in error filed her separate answer in the action instituted by the Attorney General (R. 17) wherein she raised the question of the constitutionality of the historical interest statute (Art. III, Chapter 26, R. S. 1923), and alleged that said law is a violation of the Fourteenth Amendment to the Federal Constitution, and has challenged the constitutionality of said statute and of the proceedings carried forward thereunder from the filing of her answer to this day. The question was raised at the trial provided for in the statute (R. 30 *et seq.*). On the objections made in the trial, the court ruled the statute and proceedings to be constitutional (R. 33), and at the conclusion of the trial filed conclusions of law (R. 35), number four of which specifically holds the statute in question to be constitutional and not in violation of the Fourteenth

Amendment of the Federal Constitution, and holds (R. 37, Counel. 11) that the purpose for which the property was taken is a public purpose.

From the judgment and decision of the District Court of Johnson County, plaintiff in error appealed to the Supreme Court of Kansas, where the matter was submitted on briefs and oral argument November 3, 1927 (R. 61), and thereafter and on December 10, 1927, that court rendered a decision affirming the decision of the trial court specifically holding that the statute providing that any tract of land invested with unusual historical interest may be taken for the use and benefit of the State by condemnation, specifies the use, and the use is a public use.

The syllabus by the court and the opinion in that case (R. 62-124 Kan. 716, 261 Pac. 556) are as follows:

SYLLABUS BY THE COURT.

The statute providing that any tract of land invested with unusual historical interest may be taken for the use and benefit of the State by condemnation, specifies the use, and the use is a public use.

Appeal from Johnson District Court, G. A. Roberds, judge. Opinion filed December 10, 1927. Affirmed.

The opinion of the court was delivered by Burch, J.: The State condemned a tract of land forming the site of the historic Shawnee Mission, in what is now Johnson County, Kansas, and certain of the landowners appeal from the judgment of condemnation.

In 1921, the legislature passed an act which reads as follows:

"That the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest. Such land may be taken for the use and benefit of the State by condemnation as herein provided.

"Whenever the legislature shall pass a joint resolution, declaring that specifically described tract or parcel of land is invested with unusual historical interest, the nature of which shall be described, the Attorney General shall forthwith file condemnation proceedings in the district court of the county where the land is situated, in the name of the State: Provided, That this State may accept and hold such property by gift or devise without any resolution" (R. S. 26-301, 26-302).

Succeeding sections provided for assessment of damages by appraisers appointed by the district court, report of the appraisers, notice to interested persons and opportunity to be heard in the district court on the appraisers' report, authority of the district court to approve, disapprove, or modify the report, order of condemnation, and payment of claims. In 1927, the legislature passed a joint resolution declaring the Shawnee Mission lands and buildings to be of unusual historical interest, and providing for acquiring the land and buildings by condemnation. The land was described, the nature of the historical interest was described, and Sections 3 and 4 read as follows:

"That said land be taken for the use and benefit of the State of Kansas by condemnation as provided by law.

"That upon the taking over of said property by the State, the governor shall designate the State Historical Society the custodian thereof, and he shall direct the secretary of the State Historical Society, the State architect, and one other person designed by the governor, to make a survey of said property and recommend such measures as they may deem necessary and advisable for the proper preservation and restoration of said property" (Laws 1927, Ch. 265).

At the same session the legislature passed an act making an appropriation to pay the cost of condemnation and making a further appropriation for the restoration, improvement, and maintenance of the land and buildings. Section 7 reads as follows:

"The said board created by Section 4 of said House Joint Resolution No. 1 shall have the management and control of said real estate after the same is reduced to the possession of the State of Kansas, and is authorized to do all things necessary to and consistent with the use of the same by the State, as a place of unusual historical interest" (Laws 1927, ch. 71).

Pursuant to this legislation, appraisers were appointed, who made an appraisement and filed a report. Notice was given of the time and place of hearing on the report. The land owners appeared and were heard. The court made findings of fact and stated conclusions of law, and entered an order of condemnation.

The appeal of Katherine C. Roe best discloses that which is relied on as a fundamental defect in the proceeding. The condemned land lies about one mile south of the city limits of Kansas City, Kansas, and about one and one-half miles west

of the city limits of Kansas City, Missouri. The portion belonging to Miss Roe was taken from a tract of 165 acres bounded on the north and east by residential additions and subdivisions, some of which are highly developed and restricted districts. Her land is adapted, or is likely soon to become adapted, to similar use. She contends she is greatly interested in knowing to what precise use the condemned land is to be put; one kind of use may enhance and another kind may detract from the value of the land not taken; she, the appraisers, and the court, should be informed by the statute itself what that use is to be, in order that she may be compensated for the taking; and the statute is fatally defective, in that it merely declares land of unusual historical interest may be taken for the use and benefit of the State.

The statute provides that the State may accept and hold places of unusual historical interest by gift and by devise. It may also take by condemnation, and it seems to the court the notion the State might acquire places invested with unusual historical interest for use as prison farms and insane asylums, is far fetched. The meaning of the statute is clear enough, that places invested with unusual historical interest may be acquired by the State by gift, devise, or condemnation, for the use and benefit of the State, as places of that character. If there were any doubt about this, the joint resolution and the appropriation act relating to acquisition of the Shawnee Mission interpret the eminent domain statute, and show what the legislative intention was. The State Historical Society is to be custodian of the place. On taking it over, a qualified person is to make a survey and recommend measures for proper preservation and

restoration of the Mission, and all things are to be done necessary to and consistent with use of the place by the State as a place of unusual historical interest.

There is further indication that withdrawal from private ownership and acquisition by the State means the place thereby becomes a memorial of that which gave it unusual historical interest. The legislature which enacted the condemnation statute passed an act providing that counties may issue bonds for the erection of buildings, memorial arches, and other structures, construct memorial boulevards, and establish memorial parks, commemorative of the valorous achievements of men and women in various branches of service in the World War (R. S. 73-401). When some house or other building, or some place, becomes hallowed on account of its historical associations, it is itself a memorial, if set free from the material uses incident to private ownership, and the two statutes are companion statutes, designed to perpetuate remembrance of that which ought not to be forgotten.

The court concludes the statute designates the specific use the State is to make of the places it may acquire.

Those who appeal contend a landowner may not be deprived of his property except for public use and in case of public necessity; that the legislature is not the final judge of public use or necessity; and that the use proposed to be made of the Shawnee Mission is not a public use justified by necessity. Authorities are cited, on the basis of which counsel say a decision is possible, marking the line between what the State may take and what it may not take by exercise of the right of

eminent domain. Counsel would earn the right to be a monument commemorative of their achievement if they could enable the court to render such a decision. But the affairs of men are not static. They change, even while the judicial hand is attempting to draw the line, and if a fairly serviceable universal rule were promulgated today, some new social need would arise tomorrow which would require a new formulation. In the opinion in the zoning ordinance case decided last year, the Supreme Court of the United States, speaking by Mr. Justice Sutherland, said:

"In the realm of constitutional law, especially, this court has perceived the embarrassment which is likely to result from an attempt to formulate rules or decide questions beyond the necessities of the immediate issue. It has preferred to follow the method of a gradual approach to the general by a systematically guarded application and extension of constitutional principles to particular cases as they arise, rather than by out of hand attempts to establish general rules to which future cases must be fitted" (*Euclid* v. *Ambler Co.*, 272 U. S. 365, 397).

Pursuing that method leaves the way open for progress in the law.

The State is not obliged to debate its needs with any property owner. The State determines for itself whether, in a given case, an exercise of the power of eminent domain is needful. The question is political, and the State is not obliged to provide any tribunal in which interested persons may be heard on that question (Cooley, Constitutional Limitations, 7th ed., p. 777). When, in the exercise of political sovereignty, the legislature resorts to eminent domain, it determines that the

use to which the condemned property is to be put is a public use. When its action is challenged by the landowner, the question, what is a public use, is one of law. In deciding the question, the court will give respectful consideration to the judgment of the legislature, and will sustain it unless it be manifestly ill-founded, but the legislature's judgment is not conclusive. This brings us to the question whether use by the State of places invested with unusual historical interest is a public one.

That the Shawnee Mission is a place invested with unusual historical interest is not disputed or open to dispute, and the entrancing tale need not be told here. It is sufficient to say the Mission was founded by the Methodist Church as an Indian mission, in 1829. Its buildings, made of brick burned on the spot, and timber cut on the banks of a nearby stream, were the first substantial habitations in a vast region now divided into populous and prosperous states. For many years the Mission remained the farthest permanent outpost of western civilization, and life at the Mission forms a chapter of absorbing interest, not only in the history of Kansas, but in the history of missionary methods of prompting civilization. Three of the buildings are still standing, and when legislation to acquire them was initiated, one was used as the residence of a truck gardener, another as a dairy, and another as a roadhouse. On the repeal of the Missouri Compromise and the reopening of the "irrepressible conflict" between freedom and slavery, by passage of the Kansas Nebraska Act in 1854, the first territorial governor established executive office in one of the buildings, and other territorial officials were quartered there. After a brief session at Pawnee, the first territorial legis-

lature adjourned to meet at the Mission, and there, among other notable doings, enacted the famous "bogus statutes" for the government of the territory. In the momentous struggle to make Kansas a free state, the Mission was a place about which raged the warfare which gave the territory the name "bleeding Kansas." The Mission was occasionally used as a military post. The Santa Fe Trail passed through the Mission grounds, and its junction with the Oregon Trail was but a short distance from the Mission. Altogether, the Shawnee Mission was so intimately connected with "the conquest of civilization" and "the ordeal of civilization" in Kansas and in the western part of the United States, that if it be fitting to maintain historical shrines, the place is worthy to be preserved as one.

When life was simple, the power of eminent domain was expended in providing for simple necessities—public buildings, public ways, and other physically indispensable things. With the advancement of civilization new needs multiply. First comes that which is natural, and afterward that which is spiritual, and cultural needs become just as cogent as the material needs of pioneer days were. The framers of the Constitution of the State of Kansas understood this. The constitution makes it mandatory upon the legislature to encourage the promotion of intellectual and moral improvement (Art. 6, Chapter 2). A specific method of encouragement is prescribed—establishment of a uniform system of common schools and schools of higher grade, embracing college and university departments. The method is not exclusive. The legislature must do that much, but it may resort to other methods perfected in the course of social

progress. The end to be subserved by State promotion of intellectual and moral improvement is better citizenship and good citizenship is inculcated by giving attention to history as history is now conceived. History is no longer a record of past events. It is an illuminating account of the expanding life of man in all its manifestations, revealing how each stage of civilization grows out of preceding stages, revealing how the past still lives in us and still dominates us, and enabling us to profit by what has gone before. So considered, history is inspirational. The Santa Fe and Oregon Trails are not merely old-time routes of trade and emigration, whose furrows in the earth's crust interfered with tillage when agriculture developed along their courses; they are highways of the indomitable spirit of man in earnest and arduous quest and fired with passion of purposeful endeavor. Considered in this way, the career of man and the careers of men stir the emotions, arouse enthusiasm and awaken zeal which fuse into patriotism is regarded as a worthy quality of citizenship. If, therefore, the Shawnee Mission, rescued from private ownership, and restored, protected, and preserved by the State, will bear tidings to this and future generations of the vicissitudes, the perplexities and the frustrations, the consecrated devotion, the dauntless bravery, and the splendid achievements denoted by the inscription on the State's great seal, "*ad astra per aspera*," and will do this with a power upon the hearts and lives of men and women which will make for better citizenship, the use is a public one.

As evidence of the efficiency of historical memorials as influences affecting citizenship, the legislature had before it the work of a multitude

of patriotic societies having many thousands of members. The chief aim of these organizations is to perpetuate the memory of service to country in order to develop an increasing love of country.

To this end they have secured the preservation of many historic houses and other buildings and of historic places, have erected monuments commemorative of historic events, have erected statutes, and have raised commemorative tablets and other memorials. The society of the Daughters of the American Revolution undertook the marking of great roadways, including the Santa Fe Trail. Besides this evidence, the legislature had before it the example of the appropriation of private property for use by the United States in restoring, preserving and marking the Gettysburg battlefield. Two distinct questions were involved: first was the proposed use a public use, and second, if the use were a public one, under what if any of its limited powers could congress make the appropriation? In the opinion of the Supreme Court of the United States sustaining the appropriation, it was said that valuable lessons in the art of war might be learned from an examination of the battlefield in connection with events which took place there; but the decision was based on broader ground:

"Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of Congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems

necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted Congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection" (*United States* v. *Gettysburg Electric Ry.*, 160 U. S. 668, 682).

> The court concludes the legislature's determination that use by the State of places invested with unusual historical interest is a public use, was well founded in law. There is nothing else of importance in the case. Condemnation by the State of the land deeded by Miss Roe to Lincoln and Lee University discharged performance of the condition subsequent inserted in the deed, and the university is entitled to the award of damages for that land. If this were not true, by the same deed Miss Roe disposed of the reversion, and she has no interest in the land or the condemnation money. The condemnation proceedings were regular. Contentions that rights protected by the Constitution of the United States were violated have been considered, and are held to be without merit.
>
> The judgment of the district court is affirmed.
>
> Harvey, J., not sitting.

Thus we have here a proceeding in error to the Supreme Court of Kansas, it being the highest court of said State in which a decision in the cause could be had to review a judgment constituting a final adjudication of the controversy in the courts of the State of Kansas, in a cause wherein was drawn in question the validity of a statute of the State of Kansas on the ground of its being repugnant to the Constitution of the United States and the decision thereon was in favor of its validity.

No question is involved in this proceeding as to sufficiency of compensation, or proper division of the award between plaintiff in error and Lincoln and Lee University, but the sole questions presented relate to

the constitutionality of the "Historical Interest Statute" and of the proceedings instituted thereunder including the Joint Resolution of the legislature condemning the land.

Plaintiff in error claims that *no use whatever was known or specified*, and that her property has been taken by the State for an unknown, undesignated unspecified purpose, and not for any purpose known at the time of the taking, or ascertained to this date, and therefore, cannot be said to be a public use or purpose, or a purpose of the quality and character essential in all expropriation of private property by the sovereign.

The specifications of error, post (R. 75), seemingly divide this one outstanding question into its component parts and are here urged as shown, but of them all it may be said that if the decision of the Supreme Court of Kansas is affirmed and it is here found that the statute in question and the proceedings instituted under it specify a use, and that the use is a public one, then all of the specifications in error fail, and conversely, if it is here found that the statute does not specify a use and or no particular use is specified, then each of the several specifications of error must stand, for which reason the entire subject will be treated in the brief without subdivision and separate argument upon each of the nine several specifications of error.

Plaintiff in error has taken the position, and seeks to maintain it here, that a portion of her property has been taken against her will by the State of Kansas under the broad powers of eminent domain, simply

because of its interesting history and for no present or future governmental, utilitarian, or specific use or purpose, and that no use or purpose was designated either in the original law or in any of the proceedings following it whereby plaintiff in error or any person interested could prophecy or visualize the result of the taking and its effect upon her remaining property.

IV.

SPECIFICATION OF ERRORS

The Supreme Court of Kansas erred in holding and deciding that Chapter 26, Article 3, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of Kansas 1921; and House Joint Resolution No. 1 of the Legislature of the State of Kansas 1927, being Chapter 295 of the Session Laws of Kansas 1927; and Chapter 71 of the Laws of Kansas 1927 are valid. The validity of said statutes and of said House Joint Resolution was denied and drawn in question by the defendant and appellant, Katherine C. Roe, on the ground of their being repugnant to the Constitution of the United States, and in contravention thereof. The said errors are more particularly set forth as follows:

The Supreme Court of Kansas erred in holding and deciding—

First. That said Article 3 of Chapter 26, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of Kansas 1921; and said House Joint Resolution No. 1, being chapter 295 of the Laws of Kansas

1927; and said Chapter 71 of the Laws of Kansas, 1927, did not abridge the privileges and immunities of citizens or of this defendant appellant, Katherine C. Roe, as guaranteed by the 14th Amendment to the Constitution of the United States.

Second. That the taking of private property by condemnation proceedings under and by virtue of the provisions of Article 3, Chapter 26, Revised Statutes of Kansas, 1923, being Chapter 271 of the Laws of Kansas, 1921; and under the provisions of House Joint Resolution No. 1, of the Legislature of Kansas, 1927, being Chapter 205 of the Laws of Kansas, 1927; and under the provisions of Chapter 71 of the Laws of Kansas, 1927, constitutes the taking of private property by the State of Kansas for a public use, and is due process of law within the meaning of the 14th Amendment to the Constitution of the United States.

Third. That said Article 3 of Chapter 26, Revised Statutes of Kansas, 1923, being Chapter 271 Laws of Kansas, 1921; and or House Joint Resolution No. 1, Kansas Legislature, 1927; and or Chapter 71 of the Laws of Kansas, 1927, specifies the use for which private property is taken by condemnation proceedings, and that the use so specified is a public use.

Fourth. That the condemnation of private property, including that of defendant and appellant, Katherine C. Roe, by the State of Kansas by virtue of House Joint Resolution No. 1, Legislature of Kansas, 1927, being Chapter 205, Laws of Kansas, 1927, and the action instituted in the District Court of Johnson County, Kansas, entitled "The State of Kansas,

ex rel. the Attorney General, Plaintiff, v. John W. Kemp, Katherine C. Roe, *et al.*, Defendants, No. 10651, and the further proceedings in said cause on appeal to this court in this cause, under and by virtue of the provisions of Article 3 of Chapter 26, Revised Statutes of Kansas, 1923, being Chapter 271, Laws of Kansas 1921, constituted due process of law, within the meaning of the 14th Amendment to the Constitution of the United States, and a proper exercise of the power of eminent domain by the State of Kansas, and a taking of private property for a specified use, and that such use was a public use.

Fifth. That the contentions of the defendant and appellant, Katherine C. Roe, that rights protected by the Constitution of the United States were violated are held to be without merit.

Sixth. That the Supreme Court of the State of Kansas erred in affirming the judgment of the District Court of Johnson County, Kansas, in said cause No. 10651, entitled State of Kansas *ex rel.* William A. Smith, Attorney General, vs. John W. Kemp, Katherine C. Roe, *et al.*

Seventh. The Supreme Court of Kansas erred in denying the petition and motion of defendant and appellant, Katherine C. Roe, for a rehearing.

Eighth. The Supreme Court of the State of Kansas erred in holding and deciding that Article 3 of Chapter 26, Revised Statutes of Kansas 1923, being Chapter 271 of the Laws of Kansas 1921, is valid and does not violate the 14th Amendment to the Federal Constitution and constitutes due process of law in the

taking of private property by the State by condemnation proceedings.

Nine. The Supreme Court of Kansas erred in holding and deciding that House Joint Resolution No. 1 of the Legislature of Kansas 1927, being Chapter 205 of the Laws of Kansas 1927, is a valid exercise of the power of eminent domain by the State and a sufficient authority for the exercise of power of eminent domain by the State and specifices a use which is public for which private property may be taken by the State by condemnation proceedings.

For which errors the defendant and appellant, Katherine C. Roe, prays that the said judgment and decision of the Supreme Court of the State of Kansas, dated December 10th, 1927, and its said judgment and decision denying the defendant and appellant a rehearing, dated January 16, 1928, be reversed and a judgment rendered in favor of the defendant and appellant, Katherine C. Roe, and for costs.

V.

ARGUMENT.

Summary of Argument.

Point A. The decision below is contrary to and in conflict with the weight of authority both Federal and State upon the fundamental principles of the law of eminent domain.

Point B. The statute and proceedings involved violate substantial rights of plaintiff in error under the provisions of the Fourteenth Amendment to the Constitution of United States, and do not constitute "due process of law."

POINT A.

The decision below is contrary to and in conflict with the weight of authority both federal and state upon the fundamental principles of the law of eminent domain.

An analysis of the record and of the statement of the case, *ante*, will disclose that the question presented here is upon the constitutionality of the "historical interest statute" of the State of Kansas, and of the proceedings instituted thereunder by the Legislature and by the Attorney General wherein the highest court of the State of Kansas held such statute and such proceedings to be valid. The constitutional question presented is that plaintiff in error's private property has been expropriated by the State without due process of law in violation of her rights guaranteed by the Fourteenth Amendment to the Constitution, because it was not taken for any specified or

particular use, and therefore, for no public use. The statute in question is spoken of as the historical interest statute and provides that private property, said to be possessed of unusual historical interest may be appropriated by the State by condemnation and provides detailed proceedings for its acquisition.

Plaintiff in error constantly has raised, and now presents for review here, objections to the statute and the proceedings because neither the Statute nor any of the proceedings instituted under the Statute by virtue of which her property is condemned, *specify any use or purpose for the condemnation*, and fail to reveal the use or purpose to which the condemned property is to be put. We are not confronted with the conventional question of public vs. private use, but we are confronted with the question *where no use is disclosed*, and which therefore makes impossible an analysis of the use to determine whether it is in truth and fact a public one. The entire case turns upon the construction of the several Acts of the Legislature of the State of Kansas, and it is not possible to go behind these acts to learn the legislative intent or to supplement them with explanatory testimony, and no such effort was ever made in this case.

We take the position that the decision of the highest court of Kansas is in conflict with the great weight of authority, both in Federal and State courts, when it holds that a use (which is said to be public) is specified in the Statute in question, and a review of the fundamental principles of the law of eminent domain would seem to facilitate an analysis of the Statute and the proceedings thereunder.

Plaintiff in error claims the power of the State to take private property by condemnation is limited to the taking for a *specified, predetermined and announced particular public use*, and for no other purpose. We claim that the use not only must be public in fact, but likewise must be known and ascertained at the time of the taking, not only as a condition precedent to the exercise of the right, but also that the future development of the condemned property and the future use to which it is to be put, and the character of the occupation to ensue can be known by the land owner at the time of the taking and by the jury or appraisers, or other tribunal empowered to award compensation, with the consequent effect upon the remaining lands. In a jurisdiction such as this where the measure of damages to be awarded is the difference between the value of the entire holding before condemnation and afterwards, (*Smith* v. *Wyandotte County*, 113 Kans. 244) the owner and the compensating board of necessity must be able to visualize the entire property as it stands before the land is taken and as it and the remainder of it will appear after expropriation and improvement.

In this case, plaintiff in error was the owner of one hundred sixty nine acres of land close to the city limits of both Kansas City and Kansas City, Missouri, on a public highway known as the Santa Fe Trail, readily adapted to surburban development (R. 64), and from her one hundred sixty-nine acres there has been carved out slightly more than seven and one-half acres in one corner. A portion of this seven and one-half acres had been donated by her to an educational institution for a

peculiarly advantageous development, and this is now taken with additional acres from her own holdings, by the State *for an intangible, unknown, unspecified and undetermined use and purpose*. Neither she nor the Board of Appraisers could possibly visualize the contemplated occupation by the State nor know from anything in this case whether the condemned area was simply to be "rescued" from her private ownership and made public property, or developed by the building of beautiful structures and parks, or converted into a burial ground for indigent pioneers, and the effect of the taking upon her remaining lands would depend to a greater or less extent upon the subsequent use of the property thus acquired by the State.

The taking of this property forcibly and against her will is an exercise of one of the inherent prerogatives of sovereignty, and unless this right is exercised with fidelity to the well known and thoroughly established principles of law the effort does not ripen into and actually become a right, and cannot be made the vehicle for transferring valuable property from private ownership to public.

These principles of law may be said to be conditions precedent to the exercise of the right of eminent domain on the part of the State and embrace at least two elements; one, that compensation must be paid, and the other, that the property must be taken for a particular use, and that use must be a public one.

Volumes have been written upon the subject of the necessity for compensation, and it is said that provision for compensation is a condition precedent to the exercise of such power. In *Western Union Telegraph Company*

v. *Pennsylvania Railroad Co.*, 195 U. S. 538, 49 L. ed. 312, it was observed:

> "It (private property) can only be taken by the exercise of the powers of eminent domain; and a condition precedent to the exercise of such power is, we said in *Sweet* v. *Rechel*, (159 U. S. 399, 40 L. ed. 196, 16 Sup. Ct. Rep. 48) that the statute conferring it make provision for reasonable compensation to the owner of the property taken. This condition is expressed with even more emphasis in *Cherokee Nation* v. *Southern Kansas Railroad Co.*, (135 U. S. 641, 34 L. Ed. 295, 10 Sup. Ct. Rep. 965)."

Here we take the position that another condition precedent, equally important, is that private property may be taken only for a particular use and that use must be a public one. By particular use is meant a definite, ascertained, specified, known use, clearly expressed on the face of the Legislative Act or on the face of the essential jurisdictional legislation, or petition filed in court, depending upon the method of instituting each particular condemnation proceeding.

All of the definitions of eminent domain include "public use" as an essential ingredient in the exercise of the right and it seems that the necessity for a specified, named, particular use has been taken for granted, not only by text book writers but by the courts, the debate in every instance being as to whether the designated use was in truth and in fact a public one.

In *Jeffress* v. *Town of Greenville*, 154 N. C. 480, 70 S. E. 919, the following definition was given:

> "'Eminent domain' is the right or power of a sovereign state to appropriate private property to particular uses to promote public welfare."

There is a dearth of judicial or other definition of the subject in language which expresses that peculiar but essential thought, and most of the definitions to be found seemingly absorb and amalgamate the idea of particular use or specified use, or designated use into the expression "public use," assuming that no statute or Act of Congress would authorize the employment of this power without stating the purpose for which the property sought was to be employed.

It has been said:

> "'Eminent domain rights' are attributes of sovereignty to be exercised by the State with great caution and only in case of public necessity.
>
> *Wise* v. *Yazoo City*, 96 Miss. 507, 51 So. 453, 26 L. R. A. (n. s.) 1130."

Our point is that while the right of eminent domain is an inherent attribute of sovereignty, it is limited by at least two conditions precedent as announced by the courts of the United States and of the several States, to the effect that compensation must be made and the use must be a definitely known, specified, designated, specific one clearly made to appear on the face of the act and ascertainable from the act itself without resorting to a strained inference.

Appended to the decision in the case of *Zirkle* v. *Southern Railway Co.*, (102 Va. 17), 102 Am. State Rep. 895, appears an excellent note upon the general subject of eminent domain, and we take the liberty of quoting copiously therefrom, as follows:

I. Nature of the right of eminent domain.

The existence of the right of eminent domain has been recognized throughout the civilized world, but its exercise has been restricted *to cases of public necessity* and made dependent upon just compensation. *People* v. *White*, 11 Barb. 30. See also, Grotius DeJur. B. & P., b. 8, c. 14, sec. 7 Puf. De Jur Nat. *et* Gent., b. 8, c. 5, sec. 7; Byneker shoek Quaert. Jur. Pub., b. 2, c. 15; 1 Blackstone's Commentaries, 139; 2 Kent's Commentaries, 339. The right of eminent domain has been defined as the rightful authority which exists in every sovereignty to control and regulate those rights of a public nature which pertain to its citizens in common, and to appropriate and control individual property for the public benefit, as the public safety, necessity, convenience and welfare may demand. The authority springs from no contract or arrangement between government and the citizen whose property may be appropriated, but it has its foundation in the imperative law of necessity, and is recognized, and may be defended and enforced upon the ground that no government could perpetuate its existence and further the prosperity of its people if the means for the exercise of any of its sovereign powers might be withheld at the option of individuals. The right being thus found to *rest upon necessity*, the power to appropriate in any case must be justified and limited by the necessity; hence whenever the government or its officials attempt to seize and appropriate property *which cannot be needful to the due execution of its sovereign powers or the proper discharge of any of its public functions*, the owner has the same means of resistance and legal redress as would have been available had the act

been done by an individual instead of the government or by virtue of its authority. *Trombley* v. *Humphrey*, 23 Mich. 471; *Hale* v. *Lawrence*, 21 N. J. L. 714, 47 Am. Dec. 190. So, also, it has been said to be the right of the sovereign, without the consent of the owner, to make private property subservient to the public welfare, when necessary. *It, however, rests upon public necessity and is as broad, but no broader, than that necessity.* Thus, if the wants of the public may be attained by the acquisition of an easement, nothing more can be taken, but if the whole interest is required, the whole may be appropriated. *Giesy* v. *Cincinnati etc. Co.*, 4 Ohio St. 308; *State* v. *Farrelly*, 36 Mo. App. 282. Hence, the courts declare it to be an inherent sovereign power. *Johnson* v. *Joliet etc. Co.*, 23 Ill. 202; *Moale* v. *Baltimore*, 5 Md. 314, 61 Am. Dec. 276; *Brown* v. *Beatty*, 34 Miss. 227, 69 Am. Dec. 389; *People* v. *White*, 11 Barb. 26; *Hallister* v. *State*, (Idaho) 71 Pac. 541. It remains in the aggregate body of the people in their sovereign capacity to be resumed by them in conformity with the organic and statutory law whenever the public interests demand. *Hartwell* v. *Armstrong*, 19 Barb. 166; *People* v. *New York*, 32 Barb. 102.

II Distinguished from the taxing and police powers.

The exercise of the right of eminent domain and the exercise of the taxing power, though somewhat alike, are not the same. The distinction is said to lie in the fact that taxation operates upon a community or upon a class of persons in and by some rule of apportionment, whereas the exercise of the right of eminent domain operates upon an individual, and without reference to the amount or

value exacted from any other individual or class of individuals; and also in the idea that taxation exacts money or services from individuals as and for their respective shares of contribution to the public burdens, whereas the private property taken for public use by right of eminent domain is taken as something beyond the owner's share, and hence in the latter case he is entitled to receive compensation therefor. *People* v. *Mayor etc. of Brooklyn*, 4 N. Y. 419, 55 Am. Dec. 266; *Meale* v. *Baltimore*, 5 Md. 314, 61 Am. Dec. 276.

In *Aitken* v. *Wells River*, 70 Vt. 308, 67 Am. St. Rep. 672, 40 Atl. 829, 41 L. R. A. 556, the court held that the destruction of property to avert an imminent public injury is not a taking for a public use, and is, in no legal sense, an exercise of eminent domain. It held that the former was an exercise of the police power, while the latter was based on constitutional grounds. The court also said that the taking of property for a public use can await the forms and delays of the law, but the destruction of property to prevent imminent public injury is governed by necessity which knows no law. The same distinction was also observed in *Keller* v. *Corpus Christi*, 50 Tex. 614, 32 Am. Rep. 613. In *Philadelphia* v. *Scott*, 81 Pa. St. 80, 22 Am. Rep. 738, the court in discussing the distinction between the right of eminent domain and the police power, said: "In their leading features these powers are plainly different, the latter reaching even to the destruction of property, as in tearing down a house to prevent the spread of a conflagration, or to remoral at the expense of the owner, as in case of nuisance tending to breed disease. In the first instance, the community proceeds on the ground of the overwhelming calamity; and in the second, be-

cause of the fault of the owner of the thing; and in either case compensation is not a condition of the exercise of the power. The same general principles attend its exercise in other directions, and it is generally based on disaster, fault, inevitable necessity. On the other hand the power of eminent domain is conditioned generally upon compensation to the owner, and for the most part is founded, not in calamity or fault, *but in public utility.*" Substantially the same distinction was observed in *Livingston v. Ellis County*, 30 Tex. Civ. 19, 68 S. W. 723. But the fact that the taking of land for the erection of a hospital for persons suffering from contagious diseases was sanctioned by the police power does not prevent it from being also an exercise of the right of eminent domain. See *Mayor v. Bruce*, (Mass.) 71 N. E. 537. The destruction of buildings to prevent the spread of a fire is generally considered an exercise of the police power, and not that of eminent domain. See note to *Hale v. Lawrence*, 47 Am. Dec. 190.

III. When right of eminent domain may be exercised.

The use which will justify the taking of private property under the exercise of the right of eminent domain is the use by or for the government, the general public or some portion of it; and not the use by or for particular individuals or for the benefit of certain estates. The use, however, may be limited to the inhabitants of a small locality, but the benefit must be in common. *McQuillen v. Hatton*, 42 Ohio St. 202; *Loughbridge v. Harris*, 42 Ga. 500; *Nesbitt v. Trumbo*, 39 Ill. 110, 89 Am. Dec. 290; *Chicago etc. Ry. Co. v. Galt*, 133 Ill. 657, 23 N. E. 425, 24 N. E. 674; *Gaylord v. San-*

tary Dist., 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522; *Anderson* v. *Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Hancock Stock etc. Co.* v. *Adams*, 87 Ky. 417, 9 S. W. 246; *Allen* v. *Inhabitants of Jay*, 60 Me. 124, 11 Am. Rep. 185; *State* v. *Graves*, 19 Md. 351, 81 Am. Dec. 639; *Dickey* v. *Tennison*, 27 Mo. 373; *Welton* v. *Dickson*, 38 Neb. 767, 41 Am. St. Rep. 771, 57 N. W. 559, 22 L. R. A. 496; *Concord R. R. Co.* v. *Greely*, 17 N. H. 47; *Scudder* v. *Trenton etc. Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 756; *Varick* v. *Smith*, 5 Paige 137, 28 Am. Dec. 417; *Dunham* v. *Williams*, 36 Barb. 136; *Bennett* v. *Boyle*, 40 Barb. 551; *Embury* v. *Conner*, 3 N. Y. 511; 53 Am. Dec. 325; *Matter of Tuthill*, 163 N. Y. 133, 79 Am. St. Rep. 574, 57 N. E. 303; *Dalles Lumbering Co.* v. *Urquhart*, 16 Or. 67, 19 Pac. 78; *Nash* v. *Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371; *In re Narre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195; *Fallsburg, etc. Co.* v. *Alexander*, 101 Va. 98, 99 Am. St. Rep. 855, 43 S. E. 194; *Osborn* v. *Hart*, 24 Wis. 89, 1 Am. Rep. 161; *Wisconsin Water Co.* v. *Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L. R. A. 662.

IV. What constitutes a public use.

In General—In *Dayton etc. Co.* v. *Seawell*, 11 Nev. 400, Chief Justice Hawley remarked that:

"No question has ever been submitted to the courts upon which there is a greater variety and conflict of reasoning and results than that presented as to the meaning of the words 'public use,' as found in the different state constitutions regulating the right of eminent domain. The reasoning is in many of the cases as unsatisfac-

tory as the results have been uncertain. The beaten paths of precedent to which courts, when in doubt, seek refuge here furnish no safe guide to lead us through the long lane of uncertainty to the open highway of public justice and of right. The authorities are so diverse and conflicting that no matter which road the court may take it will be sustained and opposed by about an equal number of the decided cases. In this dilemma the meaning must, in every case, be determined by the common sense of each individual judge who has the power of deciding it." And in *Avery v. Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, the court, in referring to the presentation of the views of other courts on the question of public use, said: "In considering these opinions it must be remembered that some states have constitutional provisions much broader than ours, and that even a slight variation of expression may be influential in determining the line of decision." It has been said that the term "public use" is synonymous with public benefit or advantage: *Olmstead v. Camp*, 33 Conn. 532, 89 Am. Dec. 221; *Dayton etc. Co. v. Seavell*, 11 Nev. 394. But in *Matter of Niagara Falls etc. R. Co.*, 108 N. Y. 375, 15 N. E. 429, it was said that the expressions "public interest" and "public use" are not synonymous. The term "public use" is a rather flexible one; hence the courts have avoided a positive definition lest it prove an embarrassment in subsequent cases and work a mischief in practical application: *Ryan v. Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303; *Parton etc. Land Co. v. Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853. There is no

arbitrary standard by which to determine whether the purpose to which property is appropriated possesses the elements of public utility. The public use required need not be the use or benefit of the whole public or State or any larger portion of it. It may be for the inhabitants of a small or restricted locality, but the use and benefit must be in common. The use is also said to be public when it promotes the interest of a considerable portion of the community, although, as we have seen, it may not benefit the community at large: *Paxton etc. Land Co.* v. *Farmers' etc. Land Co.* 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853. See also *Lux* v. *Haggin*, 69 Cal. 304, 10 Pac. 674; *Ouzy* v. *Goodwin*, 3 Ariz. 255, 26 Pac. 376; *Foster* v. *Park Com.*, 133 Mass. 321; *Coster* v. *Tide Water Co.*, 18 N. J. Eq. 54; *Pocantico Water Works Co.* v. *Bird*, 130 N. Y. 249, 29 N. E. 246; *Umatilla Irrigation Co.* v. *Barnhart*, 22 Or. 389, 30 Pac. 37; *Haggar* v. *Reclamation District*, 111 U. S. 701, 4 Sup. Ct. Rep. 663, 28 L. ed. 569; *Wurts* v. *Hoagland*, 114 U. S. 606, 15 Sup. Ct. Rep. 1086, 29 L. ed. 229. In *Wisconsin Water Co.* v. *Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1063, 20 L. R. A. 662, it was stated that though the property taken by the right of eminent domain is vested in the private individuals or corporations thus acquiring it, still the public retain certain definite rights to its use and enjoyment, and to that extent it remains under control of the legislature. But that if no such rights are secured to the public, the property is not taken for public use. In *Gaylord* v. *Sanitary District*, 204 Ill. 576, 68 N. E. 522, 98 Am. St. Rep. 235, *it was held that to constitute a public use,*

something more than a mere benefit to the public must flow from the contemplated movement, and the public must to some extent be entitled to enjoy the property as a right and not a mere favor. In *Nash* v. *Clark*, 27 Utah, 158, 101 Am. St. Rep. 953, 75 Pac. 371, which is perhaps one of the latest cases discussing what is a public use, the court said: "There is no fixed rule of law by which this question can be determined. In other words, what is a public use cannot always be determined by the application of purely legal principles. This is evident from the fact that there are two lines of authorities, neither of which attempt to lay down any fixed rule as a guide to be followed in all cases. One class of authorities, in a general way, holds that by public use is meant a use by the public or its agencies—that is, the public must have the right to the actual use in some way of the property appropriated; whereas the other line of decisions holds that it is a public use within the meaning of the law where the taking is for a use that will promote the public interest, and which use tends to develop the great natural resources of the commonwealth. After a careful examination of the leading cases on this subject, we are of the opinion that the class of decisions last mentioned is more in harmony with enlightened public policy, and that the liberal interpretation given the term 'public use' which the legislature has, in effect, declared shall be followed in this State is far more conducive to individual and public advancement than the restricted construction adopted and followed by the line of decisions first referred to." So, also, in *Fallsburg etc. Mfg. Co.* v. *Alexander*, 101 Va. 98, 99 Am.

St. Rep. 855, 43 S. E. 194, it was held that to justify the exercise of the right of eminent domain, ***the general public must have a definite and fixed use of the property to be condemned;*** a use independent of the private person or corporation in whom the title to the property, when condemned, will be vested, and such a public use as cannot be defeated by such private owner, but which continues to be guarded and controlled by the general public through the legislature; *such public use must be clearly a needful one for the public, and one which cannot be given up without obvious general loss and convenience;* it must also be impossible, or very difficult, at least, to secure the same public use and purpose otherwise than by authorizing the condemnation of the property.

In *Dayton, etc., Min. Co.* v. *Seawell*, 11 Nev. 394, the court, in holding that the condemnation of a strip of land for the purpose of transporting wood, lumber and other materials to a mine was for a public use, because mining was one of the leading industries of the State, announced the broad doctrine, that any appropriation of private property for any purpose of great public benefit, interest or advantage to the community is a taking for public use.

The doctrine announced in this case, was, however, criticised in *Healy Lumber Co.* v. *Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681, as being a dangerous doctrine, tending to encroach upon private rights which the constitution has attempted to safeguard, and to render such rights as uncertain and varying as are the interests of different localities and opinions of different judges on different branches of business. The court, after remarking that the constitution was the funda-

mental law and that its enactments, whether in the nature of grants or limitations, were presumed to be stable and uniform, and to constitute a check on the unstable sentiments and actions of members of different legislatures, drew a distinction between the idea of public policy and public use. The court, in this connection said: "It cannot be that, within the meaning of the constitution, the distinction between public policy and public use is to be obliterated. It might be of unquestionable public policy, and for the best interests of the State, to allow condemnation of lands in every instance where it would result in aiding prosperous business enterprises which would give employment to labor, stimulate trade, increase property values, and thereby increase revenues of the State, even if the enterprise was purely private; for such is the relation, under our form of government, between public and private prosperity, that one cannot be enjoyed to any appreciable extent without favorably influencing the other. But it is evident that this was not the kind of public use that was within the minds of the framers of the constitution; and it seems to us that the logic of those courts which have sustained appellant's contention is justified solely on grounds of public policy." The court then held that the use necessary to form a basis for the exercise of the right of eminent domain must be either a use by the public or by some agency which is *quasi* public, and not simply a use which may incidentally or indirectly promote the public interest or the general prosperity of the State. Somewhat the same line of reasoning in regard to making public utility the main constituent of "public use" was employed in *Bloodgood v. Mohawk, etc., R. R. Co.*, 18 Wend. 9, 31

Am. Dec. 313. For a further discussion of this subject see, also, the following subdivisions. In Appeal of Edgewood R. Co., 79 Pa. St. 269, it was said that the use must be *a present public advantage*, and not contingent upon the success of the projected speculation. So, also, in *Avery* v. *Vermont Electric Co.*, 75 Vt. 235, 98 Am. St. Rep. 818, 54 Atl. 179, it was held that the power of eminent domain cannot be invoked on the theory that if the petitioner fails to give equal advantages to all, a forfeiture would be worked, *since the condition which makes a use public must exist at the time of the taking*.

But the fact that an undertaking is instituted with a primary view of private profit does not make it a private use where it is in fact impressed with a public use: *Ryan* v. *Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. And the right of eminent domain also excludes the idea that property may be taken for private use or under semblance of public use, and immediately or ultimately conveyed and appropriated to private uses: *Dunham* v. *Williams*, 36 Barb. 136.

Effect of Local or Changed Conditions on Public Use. What is a public use depends on the varying demands and needs of society as constituted at the time of determining the question. Many improvements now universally recognized as being impressed with a public use were not so recognized not many years ago, and, on the other hand, it might also be said that some things which were formerly recognized as being impressed would in the light of present improvements not now be recognized as constituting a public use: *Scudder* v. *Trenton, etc., Falls Co.*, 1 N. J. Eq.

694, 23 Am. Dec. 756; *Ryan* v. *Terminal Co.*, 102 Tenn. 118, 50 S. W. 744 45 L. R. A. 303; *In re Narre Water Co.*, 62 Vt. 27, 20 Atl. 109, 9 L. R. A. 195. The term "public use" is said to be flexible, and that it cannot be limited to the public use known at the time of the forming of the constitution. *Any use of anything which will satisfy a reasonable public demand for public facilities for travel or for transmission of intelligence or commodities, is said to be a public use*: *Stewart* v. *Great Northern Ry. Co.*, 65 Minn. 517, 68 N. W. 208, 33 L. R. A. 427. In *Dallas Lumbering Co.* v. *Urquhart*, 16 Or. 71, 19 Pac. 8, the court said: "The nature of the work or improvement, the surrounding circumstances and conditions, and the general policy of the State appear to have frequently exercised a controlling influence on the subject. In some of the states it has been closely restricted, while in others it has been more liberally construed. The industries of this State are in their infancy, and its resources are comparatively undeveloped, and we would hesitate before laying down a rule of construction that might retard the growth or development of either. The public certainly have an interest in the cheap delivery of the timber, lumber and other products of the forest, or whatever other commodity may be transported by being floated to cities or other places for consumption. So in many parts of the State the use of water for purposes of irrigation is of great utility. By its use the 'desert is made to blossom, and large sections of waste and unproductive land may be reduced to a state of fertility and productiveness, thus adding materially to the wealth, population and general resources of the State.' For these purposes, as

well as more enlarged systems of navigation by boats, canals may be useful and necessary, and in such cases it is not perceived why the power of eminent domain may not be invoked. These and other like improvements may be of iost as much public utility as railroads, plank roads, clay roads, or bridges, and the like, in furtherance of which the power is frequently exerted without a question." Similar views were expressed in the very recent case of *Highland Boy Gold Min. Co.* v. *Strickley*, (Utah), 78 Pac. 296, wherein it was said: "There appears to be an irreconcilable conflict in the authorities as to what constitutes a public use. This, no doubt is largely due to the fact that in many cases what would be a public use in one jurisdiction would not be in another or different jurisdiction. Thus it has been almost uniformly held throughout the Pacific Coast states that the construction and operation of irrigation ditches is a public use, which doctrine, when applied to the arid region, has been approved by the Supreme Court of the United States, whereas in Ohio, New York, Pennsylvania and other states where irrigation is not followed, and is practically unknown, it would undoubtedly be held not a public use. *Therefore, what shall be considered a public use often depends somewhat upon the locality, the wants and necessities of the people, the conditions with which they are surrounded, and the nature and character of the natural resources of such locality, state or commonwealth.*" Substantially the same views were expressed in *Paxton, etc., Land Co.* v. *Farmers' etc., Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Ryan* v. *Terminal Co.*, 102 Tenn. 111, 50 S. W. 744, 45 L. R. A. 303. The magnitude of the

interests to be benefited has been held to be of great importance in determining whether the proposed use is of such a public character as to warrant the exercise of the right of eminent domain: *Dayton, etc., Min. Co.* v. *Seawell*, 11 Nev. 394; *Overman, etc., Co.* v. *Corcoran*, 15 Nev. 147; *Douglas* v. *Byrnes*, 59 Fed. 31; *Hand Gold Min.* v. *Parker*, 59 Ga. 419. Thus in *Butte etc., Ry. Co.* v. *Montana etc., Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 504, it was held that in a state where mining is the dominant industry, the magnitude of the interest involved properly became a determining factor in sustaining the right of a railroad to construct lateral branches, tracks and spurs to mines and mining works, since it was such a public use as authorized the exercise of eminent domain.

Although the consideration of the benefits accruing to the community from the standpoint of public policy was criticised in *Healy Lumber Co.* v. *Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681 (discussed in the preceding subdivision), the consideration of such benefits in applying the doctrine of eminent domain has by no means been confined to the western states, whose decisions have been adverted to. Thus, in *Hazen* v. *Essex Co.*, 12 Cush. 475, it was held that where the general public advantage was greatly promoted by improvements of natural water powers that the use was public; and in *Moore* v. *Sanford*, 151 Mass. 286, 24 N. E. 323, 7 L. R. A. 151, the improvement of Boston harbor by the reclamation of a large body of land for commercial purposes was held to be of great public advantage. In *Stewart* v. *Great Northern Ry. Co.*, 65 Minn. 517, 68 N. W. 208, 33 L. R. A. 427, the court having in view the

magnitude of the agricultural interest of that State, held that the building of grain elevators was a public use. The principles underlying these cases was substantially asserted in the celebrated case of *Munn* v. *Illinois*, 94 U. S. 113, 24 L. Ed. 77. And in *Great Falls Mfg. Co.* v. *Fernald*, 47 N. H. 444, the court adverted to the great interest which the State of New Hampshire had in the improvement of her water powers, and to the great commercial prosperity arising to her citizens from the development of those natural resources. So, also, in *Scudder* v. *Trenton, etc., Co.*, 1 N. J. Eq. 694, 23 Am. Dec. 766, the court in holding that the creation of a water power to be used by a corporation or leased by it to individuals for the purpose of establishing extensive manufactories in a populous district was a public benefit, adverted to the manufacturing industries fostered in the neighboring City of Paterson, through such a use of its water power. A somewhat different view was entertained by the court in *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576, 98 Am. St. Rep. 235, 68 N. E. 522, wherein it was held that the use must be one which the public, to some extent, have a right to use, and not one which is merely a benefit to the public. In that case the court held a law authorizing the condemnation of private property for the purposes of public machinery other than public gristmills void as permitting the taking of property for a private use. As bearing on the argument against the condemnation of land for the purposes of public mills, see, also, *Loughbridge* v. *Harris*, 42 Ga. 500; *Sadler* v. *Langham*, 34 Ala. 311; *McCulley* v. *Cunningham*, 96 Ala. 583, 11 South 694; *Ryerson* v. *Brown*, 35 Mich. 333, 24 Am.

Rep. 564; *Harding* v. *Goodlet*, 3 Yerg. (11 Tenn.) 41, 24 Am. Dec. 546; *Tyler* v. *Beecher*, 44 Vt. 648, 8 Am. Rep. 398.

Effect Where Use Is Enjoyed Only By Limited Number.—It does not seem to be controverted that if, in point of law, a use is public, the fact that not very many persons will enjoy the use is not material in applying the doctrine of eminent domain: *Butte etc., Ry. Co.* v. *Montana, etc., Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298; *Talbot* v. *Hudson*, 16 Gray, 417; *Philips* v. *Watson*, 63 Iowa 28, 18 N. W. 659; *Kettle River Ry. Co.* v. *Eastern Ry. Co.*, 41 Minn. 461, 43 N. W. 469, 6 L. R. A. 111; *Paxton etc., Land Co.* v. *Farmers' etc., Land Co.*, 45 Neb. 884, 500 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Shaver* v. *Starrett*, 4 Ohio St. 496.

Effect Where Public Use Is Incidental to Private Use.—Where the substantial benefit from the appropriation of lands under the right of eminent domain is for the benefit of a private individual, and the benefit to the public is only incidental and purely prospective, the use is not a public use: *Stratford* v. *Greensboro*, 124 N. C. 127, 32 S. E. 394; *Berrien Springs, etc. Power Co.* v. *Berrien*, (Mich.) 94 N. W. 379; *Ryerson* v. *Brown*, 35 Mich. 333, 24 Am. Rep. 564; *Attorney General* v. *Eau Claire*, 37 Wis. 437. In the case of *Berrien Springs etc. Power Co.* v. *Berrien*, (Mich.) 94 N. W. 379, the plaintiff sought to condemn certain land for the purpose of constructing a dam whereby a water power would be created. The plaintiff was a corporation organized for the purpose of using the water power to be so created for mining, manufacturing, domestic, municipal, agricultural and navigation purposes, and also to furnish the peo-

ple in the vicinity with electricity for lighting and other purposes. The court held that the public use was merely incidental to the main purposes of the contemplated use. The principle was substantially asserted in *Avery* v. *Vermont Electric Co.*, 75 Vt. 240, 98 Am. St. Rep. 818, 54 Atl. 179, where the court held that the application of water power to the generation of electricity for use as the motive power of a railway was not a public use, even though the operation of the railroad was a use of a public character; see also, the cases collected in the note to *Beekman* v. *Saratoga, etc., R. R. Co.*, 22 Am. Dec. 686. Of course, the mere fact that private interests will incidentally be benefited by the exercise of the right of eminent domain is immaterial if the purpose for which the right is sought to be exercised is a public use; *South Chicago R. R. Co.* v. *Dix*, 109 Ill. 243; *Berrien Springs, etc. Co.* v. *Berrien*, (Mich.) 94 N. W. 379.

Decreased Cost by Exercise of Eminent Domain as Constituting a Public Use or Necessity.—In *Samish River Boom Co.* v. *Union Boom Co.*, 32 Wash. 586, 73 Pac. 670, the petitioner sought to condemn a certain tract of land near the mouth of a river for boom purposes; the respondent, however, claimed that there were other places which offered abundant and ample facilities for boom works. The court in discussing this contention said: "It is further contended by the respondent that the petitioner has not in this instance shown any necessity for the taking of the particular lands which it seeks to appropriate, as it appears that there is other land available, although perhaps not so convenient for its purposes, and it is argued that the mere matter of convenience can-

not be considered. It is true that the petitioner cannot condemn this property in the absence of any necessity therefor. But the word 'necessity,' as used in the statute, 'does not mean an absolute and unconditional necessity, as determined by physical causes, but a reasonable necessity, under the circumstances of the particular case, dependent upon the practicability of another route (here another location) considered in connection with the relative cost to one, and probable injury to the other' "; citing *Mobile etc. R. Co.* v. *Alabama etc. Ry. Co.*, 87 Ala. 508, 6 South 406. On the point as to the "necessity" for the exercise of the right of eminent domain in the particular case, it was said in *Butte etc. Ry. Co.* v. *Montana etc. Ry. Co.*, 16 Mont. 504, 50 Am. St. Rep. 508, 41 Pac. 232, 31 L. R. A. 298, "that 'necessary,' in this connection, does not mean an absolute or indispensable necessity, but reasonable, requisite and proper for the establishment of the end in view, under the particular circumstances of the case." And in *Postal Tel. etc. Co.* v. *Oregon, etc. R. Co.*, 23 Utah 474, 90 Am. St. Rep. 705, 65 Pac. 735, it was said, under somewhat similar circumstances, that: "It is not a question whether there is other land to be had that is equally available, but the question is whether the land sought is needed for the construction of the public work."

V. Who determines what is a public use.

Decisions may be found asserting that what is a public use is a legislative question and other decisions declaring with equal emphasis that this is a judicial question. But where there is a constitutional provision denying the right to take lands for any other than a public use, it would seem that

the question whether any particular use is a public use or not is, ultimately at least, a judicial question: See monographic notes to *Lynch* v. *Forbes*, 42 Am. St. Rep. 406; *Chicago, etc. Ry. Co.* v. *Morehouse*, 88 Am. St. Rep. 932. In this see also, *In re Madera Irr. Dist.*, 92 Cal. 298, 27 Am. St. Rep. 106, 28 Pac. 274, 14 L. R. A. 755; *Paxton etc. Land Co.* v. *Farmers, etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Rockingham etc. Power Co.* v. *Hobbs*, 72 N. H. 531, 58 Atl. 46; *Bridal Veil etc. Co.* v. *Johnson*, 30 Or. 205, 60 Am. St. Rep. 818, 46 Pac. 790, 34 L. R. A. 368; *Fanning* v. *Gilliland*, 37 Or. 369, 82 Am. St. Rep. 758, 61 Pac. 636, 62 Pac. 209; *Highland Boy etc. Co.* v. *Strickley*, (Utah) 78 Pac. 296; *Stearns* v. *City of Barre*, 73 Vt. 281, 87 Am. St. Rep. 721, 50 Atl. 1086; *Healy Lumber Co.* v. *Morris*, 33 Wash. 490, 99 Am. St. Rep. 964, 74 Pac. 681; *Wisconsin Water Co.* v. *Winans*, 85 Wis. 26, 39 Am. St. Rep. 813, 54 N. W. 1003, 20 L. R. A. 662. But the necessity or expediency of appropriating property or authorizing its appropriation when the use is public is a legislative and not a judicial question: *Paxton etc. Land Co.* v. *Farmers' etc. Land Co.*, 45 Neb. 884, 50 Am. St. Rep. 585, 64 N. W. 343, 29 L. R. A. 853; *Lynch* v. *Forbes*, 161 Mass. 302, 37 N. E. 437, 42 Am. St. Rep. 402, and note. See, also, note to *Beekman* v. *Saratoga etc. R. Co.*, 22 Am. Dec. 686; *Postal Tel. etc. Co.* v. *Oregon etc. Co.*, 23 Utah, 474, 90 Am. St. Rep. 705, 65 Pac. 735. In *Grande Ronde Electrical Co.* v. *Drake*, (Ore.) 78 Pac. 1031, it was held that the question whether or not a proposed use is in fact public or private is to be determined by the courts, independently of the objects expressed in the charter of the corporation claiming to be the recipient

of the authority or of the statute purporting to confer it.

Note to *Zircle* v. *So. Rly. Co.*, 102 American State Rep. 809.

Following the text of the notes preceding will be found a long list of uses which have been declared to be public, covering means of transportation, roads, highways and bridges, aids to mining, lumbering and agricultural pursuits, water rights, drainage, public health, etc., and matters affecting navigation, but in every case, the use was definitely and specifically fixed and determined and the adjudications refer to *specified* uses and not to mere speculative, possible or totally unknown uses.

From the foregoing, it will be seen that while the right of eminent domain is inherent in government, and is one of the outstanding prerogatives of sovereignty, it nevertheless is circumscribed by certain other well defined rules and limitations equally important as the right; among others, that the invasion of the citizen's elementary rights shall only be occasioned for a known, specified, public use.

We are not here confronted with any fine distinction between a public use and a private use, *but we are here concerned in ascertaining that there really is a public use.* [illegible]

The thought is somewhat carried out in the opinion of the Supreme Court of Illinois in the case of *Chicago and Northern Railway Company* v. *Galt*, 23 N. E. 425, l. c. 427, where that railroad undertook to condemn land for two purposes, viz.: for right of

way and for the alteration of a street in a town. In discussing this, the court said:

> "There is nothing in the proceedings to indicate that any particular part of the land sought to be taken was for railway purposes, and another part thereof for the street sought to be laid out and substituted for River Street; but the whole south fifty feet of the lots were sought to be condemned for two distinct purposes, one within the power conferred upon the company, and the other not. Such a proceeding is not authorized by law, and cannot be in a summary proceeding by which the citizen is deprived of his property rights. Lewis on Eminent Domain, Section 600, says:
>
> 'The power to force a man to give up his property against his will, and for a consideration fixed by others, is one which is in its nature harsh and against common right. According to all analogies of the law such a power, to be effectual in its exercise, must be strictly pursued. This has been repeatedly held with respect to the power of eminent domain.' To put the court in motion and give it jurisidetion in condemnation proceedings, a petition is in general necessary, and must be in conformity with the statute granting the right of condemnation. It should set forth with proper averments, all such facts as are necessary to authorize the tribunal to act. *Smith* v. *Railroad Co.*, 105 Ill. 511; *Bailey* v. *McCain*, 92 Ill. 277. It is thus stated by Mr. Lewis, (Section 353): '*The petition should show the use or purpose for which the property is desired*, and that it is within the statutory powers conferred. *It should show a clear right to condemn the property described.* Accordingly, it

must not only show that the property is wanted for public use, but also that it is for a use that is within the particular statute under which the proceedings are had.' It is true that both purposes for which the condemnation was sought were public uses, but the use for a public street was not within the statute authorizing the proceedings by the railroad company, and could not be made the basis of such proceeding. Under such a petition as is presented, the court could not condemn the whole or any part for right of way."

Chicago & Northwestern Ry. Co. v. *Galt*, (Sup. Court of Ill. 1890), 23 N. E. 425.

Thus it is seen that the entire proceeding was vitiated by the railroad's attempt to take the land for an unauthorized purpose, but even there, the purpose was known and was neither vague nor speculative. A clear right to condemn did not appear.

In the case of *Dice* v. *Sherman*, (Supreme Court of Appeals of Virginia 1901), 39 S. E. 388, while the case turned upon the determination of a question of public as opposed to private use, that distinguished court made the following observations:

"When the power of eminent domain is invoked, it must be made *clearly to appear* that the property sought to be condemned is useful to the public and the existence or nonexistence of a public use in any given case must be determined by the court. Citing cases. The purpose for which the property is sought to be taken in the case at bar *does not clearly appear to be for a public use or public purpose.* On the contrary, the grounds of public benefit upon which the case

is opposed are *vague, indefinite and uncertain*, and the use which the public is to have of the property, or the manner in which it is to be benefited by such use *is by no means fixed and definite* and may be gainsaid, denied or withdrawn so far as the records show at the will of the defendant in error."

How then can it be said that the State of Kansas may condemn private property in this proceeding? The grounds of public benefit in the statute we are now considering are not only vague, indefinite and uncertain, but are obviously unknown, unstated and unspecified. They are not even hinted at, and for one to know or surmise, he must of necessity go beyond the plain language of the acts and resort to speculation.

We find no case where the sovereign has attempted to take private property merely because that property had an interesting history, and we are not unmindful of the Gettsburg case discussed *post*.

From these observations, it appears that while originally the public use authorizing condemnation proceedings was one of governmental necessity, it has been broadened by the tendency of Goverment to become more parental in its regulation of the activities of its citizens, and the right has thus been extended in some things beyond actual necessities, so that it now appears that private property may be taken for uses which are said to be public if it is ascertainable that the use is in the interest of the public, or for its welfare, its health, morals or convenience, *but in every instance of such expropriation there has been a*

definite, specified, named, known present use to which the property was put.

It is taken for parks, but the landowner knows exactly what will be adjacent to his remaining land. It is taken for playgrounds, but when the appraisers assess his damages they are able to visualize his property with the playground in the corner and can intelligently assess the damages which he will sustain by the taking. It is taken for a cemetery, and they know that in the corner of his property will be a burial ground; or for an almshouse, asylum, or penal institution, and the landowner and the appraisers and the court with a fair degree of justice can regulate his damages proportionately. If taken for a beautiful public building, they may allow him no damages to the land remaining because there will be no depreciation.

This case is the only one we are able to find where no use whatever is specified; where no living soul can visualize the development, and where no human agency, governmental or private, accurately can prophecy the intended use to which the condemned land is to be put.

The use, if any, in this case must be found in the statute or in the House Joint Resolution, or in the legislative bill appropriating money to pay the condemnation award, or in all of them jointly, and an analysis of those legislative documents seemingly fails to disclose any intended use of this land. Let us search the record and analysis the statutes and the other proceedings to see if by any possible means it can be ascertained what use, private or public, is to be made of the condemned land.

The first place we find any mention is in the Historical Interest Statute, Chapter 26, Article III, R. S. 1923 (R. 5), which is the legislative act passed to authorize the condemnation of lands possessing historical interest.

R. S. 26-301 (R. 5), the first paragraph of the act is as follows:

> "26—301. Authority to Condemn. That the power of eminent domain shall extend to any tract or parcel of land in the State of Kansas, which possesses unusual historical interest. Such land may be taken for the use and benefit of the State by condemnation as herein provided."

This is the only place in the act where one may even suspect the announcement of a purpose, and no purpose is here. It simply announces that the State may condemn land which possesses unusual historical interest for its use and benefit. This did not broaden the application of the law of eminent domain as obviously the right had existed from the beginning of Government. No one has ever put forth the argument that the State could not condemn land for its use or benefit if it needed it for some particular use in carrying on the Government, because such land might be unusually interesting from an historical standpoint. It always could have condemned this very land for a State house, a penitentiary, an insane hospital, or other governmental purpose, and so this statute says nothing new and does not extend the right. It might have been condemned at any time by an agency of the State through the delegated power of eminent do-

main. A railroad might have gone through this place notwithstanding its historical background. It is said here that the land will be taken for the use and benefit of the State, *but specifies no use and names no benefit.*

It is interesting to ask at this juncture what protection the land owner has to insure that (as indicated in the opinion of the Supreme Court of Kansas (R. 62)) the proposed use probably is the rebuilding of the Old Shawnee Mission and its maintenance in its pristine simplicity and grandeur?

Can plaintiff in error insist that this be done? Can she enjoin the State, her sovereign, from making any other or different use of it? She cannot hereafter sue the sovereign without its consent. *Her day in court is in this case.* What is there in this act to prevent the State from using this tract of ground for any purpose which the governor's board may recommend or subsequent legislatures may desire? There are many uses to which the State may put property which would effectively destroy the value of the remaining lands of plaintiff in error, such as, houses of correction, penal institutions, epileptic hospitals, insane asylums, detention homes for wayward girls and incorrigible boys, or an institution for the treatment of persons afflicted with infectious and communicable diseases. The State has not appropriated this land for a known purpose and it is fair to assume that it may use it for any purpose. The visualization of what ought to be done as shown in the opinion below seems to be but an inference and not the necessary result of an analysis of the legislative enactment. The

legislature neither promised nor guaranteed the future use of the property along the lines depicted in the opinion, and we fear, cannot be bound to carry out the suggestion of the court as to the use to be made. The legislature did not select the court as the proper tribunal to determine the future use, but it did provide for the selection of a board to be appointed by the governor, aided by the State Historical Society which should make recommendations *ad libitum* for the proper preservation and restoration, which recommendations obviously are to be made to succeeding legislatures.

Thus Chapter 26, Article 3, R. S. 1923, states no purpose of any kind for which land condemned under its provisions shall be used by the State. There is no other provision in this statute than the one we have noted which to any degree or extent might throw any light upon the question.

It may be that the legislature which passed that law was depending upon some subsequent legislature which should pass a joint resolution for condemnation in a particular instance, to state the purpose or intended use in that resolution, but the legislature of 1927 which first undertook to acquire land under this statute likewise failed to announce a purpose or let it be known what use was to be made of the land. That resolution is also barren of all information as to the prospective use of the property. In that resolution, it is said (R. 7):

> "Section 1. That the following described tract of land is declared to possess unusual historical interest."

After description by metes and bounds, we come to the end of the section without further elucidation. Section 2 declares the reasons of the legislature for believing the land is possessed of unusual historical interest and is limited to a statement of those reasons, such as, that the Shawnee Mission was probably the earliest substantial community in the State and once was used as a governor's residence, and again, the legislature met there, and was headquarters for early Indian campaigns and was the beginning in Kansas of the old Santa Fe Trial, and the mobilization center of the Oregon Trial later made famous by "The Covered Wagon."

Up to this point, no use or intended use is announced.

Section 3 provides almost in the identical words of the Earlier statute, "that said land be taken for the use and benefit of the State of Kansas by condemnation as provided by law." Still no use.

Section 4 is hostile to any thought of a declared use *because here is the place we find the ascertainment of a use and the declaration of a purpose indefinitely postponed and laid on the table.* This section provides that (not before the condemnation) but, "upon the taking over of said property by the State, the governor shall designate the State Historical Society the custodian thereof and he shall direct the secretary of the State Historical Society, the State Architect, and one other person designated by the governor *to make a survey of said property* and recommend such measures as they may deem necessary and advisable for the proper preservation or restoration of said property."

Here we learn that the State which is *now* condemning this property, by this joint resolution does not even have any definite idea of what will be done with the property and does not have a definite idea of what it consists, and instead of appropriating it for a definite, specific, present, known use, it defers the determination of the use to some future time after the property shall have been taken over by the State, and shall have been surveyed by this board, and after this board shall have arrived at a conclusion as to the proper method of preservation or restoration of the property and made recommendations to someone not mentioned in the resolution. Likely the recommendations would be made to a succeeding legislature which alone would be able to appropriate money to carry out the plans recommended. If there was a suspicion that a present existing known use was contemplated by the legislature it was completely negatived by Section 4 of this resolution, which in plain understandable language has indefinitely postponed the determination of that essential and interesting question.

Another act of the identical legislature which passed the joint resolution may throw some further light on the subject (R. 8). This is the appropriation bill to pay for the condemnation of this land.

Section 5 of this Appropriation Act contains a second appropriation in the sum of $2,000, $1,000 of which was to be expended for the fiscal year beginning July 1, 1927 and $1,000 for the fiscal year commencing July 1, 1928.

The penurious appropriation for the restoration, improvement and maintenance of the real estate and

buildings thereon of $1,000 per year for two years indicates the intention of the legislature to do nothing whatever with this property until some future time when the governor's board, mentioned in its resolution, should make a survey of the property and recommend measures for its *proper* preservation and restoration. Obviously $1,000 a year would not provide a watchman and cut the weeds, and here is a powerful endorsement of our position that no use was known or determined upon prior to or at the time of the condemnation.

In the House Joint Resolution it is said that the land shall be taken for the use and benefit of the State of Kansas. *What use* and *what benefit* are meant? Did that legislature know what use? Presumably not, because it did not know the condition of the property nor what was to be done with it; presumably not, because it had appropriated scarcely enough money to pay a watchman; presumably not, because in the same resolution it referred the question of future use to a board to be appointed by the governor to make future recommendations. It provided that *after* the property should have been condemned and taken over by the State, the State through a designated agency would *then* proceed to decide what should be done with it. The question of what was to be done with this property *did not precede* the taking but specifically is *deferred until after the taking*. No specific or other use was announced *before* the condemnation, and the use to be made will never be known until some board *subsequently* appointed shall *subsequently* report to a *subsequent* legislature which may or may not act upon the recommendations. Some future board appointed by the governor may some time report

to some future legislature and recommend that said property be converted into a cemetery or a school for Indians or a hospital, or a museum, but the fact remains that it never has occurred yet, and did not occur prior to the condemnation, and the State of Kansas has never yet determined what it desires to do with this place. It simply determined that because it had a beautiful past, it should be *rescued* from private ownership.

We take the position that the State has no right to compel the owner to part with his property against his will, by virtue of this harsh and drastic governmental right unless the sogereign power designates a reason and a use and a purpose which clearly is apparent and actually known, and which can be classified as a reasonable public use. We feel that the State cannot condemn for an unknown purpose merely to *rescue* property from private ownership or merely because it desires to terminate private ownership in the interest of preservation. The individual must bow to the yoke of government when public necessity demands it, but not for any capricious reason; not for any unknown reason, and not for any reason to be ascertained and established in the future.

We quote from the text in 20 C. J. at page 622 as follows:

> "The right to exercise the power of eminent domain is strictly limited to the uses and purposes specified in the statute conferring the power, or clearly embraced within the legitimate scope thereof, and if there remains a doubt as to the extent of the power, after reasonable intendments in its favor, such doubt will be solved adversely to the claim. * * *

It has been held that the power cannot be exercised unless the property taken is to be devoted to a public use within a reasonable time thereafter."

If the right in the instant case is strictly limited to the uses and purposes specified in the Act of 1921, we are met with a perplexing question as to what particular uses and purposes are specified. We think that a *specified* purpose is a much more restricted expression than a *suspected or inferred* purpose.

At another point in that excellent work the author makes the following observation (20 C. J. 548, Section 35, paragraph 2):

"While a few state constitutions expressly prohibit the taking of private property for private use without the consent of the owner, except for certain purposes, the courts have uniformly denied such right, some on the ground that it would deprive the owner of his property without due process of law, some on the ground that it would not be an exercise of the power of making laws or rules of civil conduct which is a branch of civil power committed to the legislatures, others on the ground that it would constitute a breach of the contract by which the land was originally granted by the government or would violate the spirit of the constitution.

The assertion of a right on the part of the legislature to take the property of one citizen and transfer it to another, even for a full compensation, where the public interest is not promoted thereby, is claiming a despotic power and one inconsistent with every just principle and fundamental maxim of a free government."

We urge that there is little distinction between taking the private property of one citizen and transferring it to another for private purposes than the taking of the property of a citizen and transferring it to the sovereign simply because the sovereign feels that it is too sacred or too valuable, or too interesting from an historical standpoint to remain the subject of private ownership and should be rescued therefrom, and as announced by the author in the text above in the case of property taken for private use, the act of the Kansas Legislature under discussion is one claiming a despotic power and inconsistent with every just principle and fundamental maxim of a free government.

By virtue of what principle does a state have the power to "*rescue*" private property from private ownership merely because of any peculiar quality of that property?

Mr. Dillon in his excellent work on municipal corporations has discussed the subject of eminent domain in its larger sense, and in the course of his remarks we find the following:

> "But as the right originates in necessity so it is limited by it.
>
> Section 1023, Vol. 3, 5th Ed. page 1619."

Again:

> "It is agreed that individual property can be compulsorily appropriated by the public *only for public use*. What is a public use has, in some aspects of the subject, given rise to much controversy, particularly in reference to the delegated exercise of the power by, or for the benefit of pri-

vate corporations, companies and individuals. Since municipal corporations are instituted for public purposes, authority to take property in order to carry out their chartered powers is not often open to the objection that the use is private and not public. Municipal uses proper are public uses. Highways are conceded to be, and manifestly are, matters of public concern; and hence the condemnation of property for streets, alleys and public ways is, undeniably, for a public use.

Section 1031, Vol. 3, 5th Ed. page 1631."

Again:

"It has been said that since public necessity is the basis of the right of eminent domain, the right cannot be exercised except where the purpose is useful, and therefore that property cannot be compulsorily acquired against the owner's consent where wanted merely for ornamental purposes. Chancellor Kent, referring to the opinions of continental jurists on the subject of eminent domain, observes that Bynkershoeck 'insists that private property cannot be taken, on any terms, without the consent of the owner, for purposes of public ornament or pleasure; and he mentions an instance in which the Roman Senate refused to allow the praetors to carry an aqueduct through the farm of an individual, against his consent, when intended merely for ornament.' If it be admitted or shown in any given case that the ornamental purpose is not associated with any useful purpose, it would seem to be true that it is inconsistent with the respect in which all enlightened governments hold private property to say that it can be compulsorily taken from the owner. Such a use is not, within the meaning of the American Constitutions, a legit

imate 'public use.' But if the land for public squares and parks, which are largely, *though not exclusively*, for ornament, may be assumed by the State, upon payment to the owner, it would be difficult to hold an act unconstitutional which authorized the condemnation of land for a public fountain or as a site for a monument. The Roman law, as we have seen, authorized legacies *ad ornatum civitatis* and *ad honorem civitatis*, which became frequent; and in respect of cities, it would perhaps be difficult to hold that the Legislature could not authorize land to be taken for purposes which would fall within the description of ornamental rather than useful. It would be an extreme case where a purpose was wholly ornamental, and not at all useful. These questions, however, lie upon the boundary of legislative power, and have not been very fully illustrated by actual adjudications. Section 1035, Vol. 3, 5th Ed., page 1628."

Again:

"Legislative and Judicial Domain Distinguished—Of necessity or expediency of exercising the right of eminent domain in the appropriation of private property to public uses, the opinion of the legislature or of the corporate body or tribunal upon which it has conferred the power to determine the question, is conclusive upon the courts, since such a question is essentially political in its nature and not judicial. But the question whether the *specified use* is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is, perhaps, ultimately a judicial one, and, if so, the courts cannot be absolutely concluded by the action or opinion of the legislative department. But if the

legislature *has declared the use or purpose* to be a public one, its judgment will be respected by the courts, unless the use be palpably private, or the necessity for the taking plainly without reasonable foundation."

Section 1036, Vol. 3, 5th Ed., page 1640.

In this we see that the use must be a *specified one*—not an imaginative one, nor one which will later be determined.

On the general subject the author further says:

"Construction of Power—Whether the power be exercised directly by the legislature, or mediately through municipal corporations or other public agencies, the *purpose or use* for which private property is authorized to be appropriated *should be specified by the legislature*, and the power will not be enlarged by doubtful construction. Therefore, authority to a city corporation to appropriate private property for streets, lanes, alleys and public squares or grounds, does not confer the power compulsorily to take private property upon which to erect a city prison. So where the purpose for which land is to be taken is as well met by construing the authority to warrant the taking of an easement only as of the fee, the grant, if doubtful, will be construed most favorably for the citizen.

Power Must be Strictly Pursued—Not only must the authority to municipal corporations or other delegated legislative agents, to take private property, be expressly conferred, and the use for which it is taken *specified*, but the power, with all constitutional and statutory limitations and directions for its exercise, must be strictly pursued.

> Since the power to condemn private property against the will of the owner is a stringent and extraordinary one, based upon public necessity or an urgent public policy, the rule requiring the power to be strictly construed and the prescribed mode for its exercise in all substantial matters strictly followed, is a just one, and should, within all reasonable limits, be inflexibly adhered to and applied.
>
> Sections 1039 and 1040, Vol. 3, 5th Ed., pages 1644, 1645 & 1646."

In this text we find that the use or purpose for which private property is authorized to be appropriated should be specified by the legislature and that the power will not be enlarged by doubtful construction.

We find the only authority to take private property is the *specified use* and the law specifying the use must be strictly construed. Some cases which the author cites in support of his text are interesting:

> "In proceedings to open streets, the costs thereof cannot, unless the right to do so be expressly or plainly given by the statute, be added to the damages and collected from the owners of the adjacent property. The words, 'the expenses of said improvement,' do not embrace the costs of the proceedings. In the absence of authority to collect the same from adjacent owners, the costs must be borne by the corporation. *Morris* v. *Chicago*, 11 Ill. 650; *S. P. Illinois & Mich. Canal Trs.* v. *Chicago*, 12 Ill. 403. See *Philip Street, In re*, 10 La. An. 313. See for rule in California, *Stanton* v. *Ashbury*, 41 Cal. 525; *post*, 139.
>
> A delegation of the power of eminent domain must be express. In the absence of an enactment

expressly conferring the power, it will not be implied. *People* v. *Rochester*, 50 N. Y. 525; *Waterbury* v. *Platt*, 75 Conn. 387; *Tacoma* v. *State*, 4 Wash. 64; *Ligare* v. *Chicago*, 139 Ill. 46; *Brunswick & W. R. Co.* v. *Waycross*, 94 Ga. 102; *Butler* v. *Thomasville*, 74 Ga. 570; *Stowe* v. *Newborn*, 127 Ga. 421, 422. Power to condemn land is not conferred by a general power to preserve the public health. *Cavanaugh* v. *Boston*, 139 Mass. 426. Power to construct sewers does not authorize the condemnation of lands therefor. *Allen* v. *Jones*, 47 Ind. 438. Authority to remove deposits in a stream does not authorize the condemnation of lands to widen it. *Schenectady* v. *Farman*, 61 Hun (N. Y.) 171, S. C. 78 Hun (N. Y.) 87.

It has been held that power to condemn cannot be implied from a mere grant of the power to lay out and open streets. In the absence of any other provision authorizing the municipal authorities to condemn property for that purpose the presumption is that the legislature intended that the necessary property should be acquired by contract. *Brunswick & W. R. Co.* v. *Waycross*, 94 Ga. 102; *Georgia R. & B. Co.* v. *Union Depot*, 119 Ga. 809, 811; *Poulan* v. *Atlantic C. L. R. Co.*, 123 Ga. 605, 609; *Stowe* v. *Newborn*, 127 Ga. 421, 422; *Tacoma* v. *State*, 4 Wash. 64; *Vancouver* v. *Wintler*, 8 Wash. 378, 381. But see *contra*, *Chicago & N. W. R. Co.* v. *Cicero*, 154 Ill. 656. But if the municipality has statutory authority to lay out and open streets, and has also general power to condemn lands for public purposes, there is a delegation of the power of eminent domain for street purposes. *Stowe* v. *Newborn*, 127 Ga. 421, 422; *Grand Rapids* v. *Coit*, 149 Mich. 668. In *Georgia R. & B. Co.* v. *Union Depot*, 119 Ga. 809, it is held that the grant

of authority to a municipality in its charter 'to require any railroad company running through said town to make such crossing as may be needed for public convenience,' does not confer on the municipality the right to exercise the power of eminent domain to open a new street across the right of way and tracks of the railroad company and without making compensation for the taking or damaging of its property for such purposes.

The extent of the power delegated to a municipal corporation to exercise the right of eminent domain is limited by the express terms or clear implication of the statute authorizing its exercise. *Waterbury* v. *Platt*, 75 Conn. 387. Authority to take property for a permanent public use, as to take land for the use of highways, does not imply the right to take it for a temporary use and limit the compensation by a valuation of the land taken for a period of five years. *Waterbury* v. *Platt*, 75 Conn. 387.

Notes 1039 & 1040, Vol. 3, 5th Ed., pages 1644 & 1645."

If Mr. Dillon is right in his carefully considered work on this subject when he says that the purpose or use for which private property is authorized to be appropriated should be *specified* by the legislature then the proceedings in this case are not good because no purpose of any kind or use of any description has been specified by the legislature.

Eminent domain statutes must be strictly construed—nothing should be taken by inference, and the court should not supply anything which the legislature failed to supply.

The district court in this case by findings of fact has undertaken to supply a deficiency in the proceedings which it was in the exclusive province of the legislature to supply and which it failed to do. He says:

> "The purpose for which the property is to be taken is a public purpose."
>
> Conclusion of Law No. 11, Journal Entry of Proceedings of April 11, 1927 (R. 37).

How could that court decide that the property was being taken for a public purpose when it did not know the purpose?

These statutes, as we have noticed, must be strictly construed:

> "The right of eminent domain is an attribute of sovereignty, and only the sovereign power, or one to whom it has delegated the right, can take property without the consent of the owner, and, when this right has been granted to a subdivision of the State, a person, or a corporation, the terms of the grant must be strictly pursued. When the matter is in doubt, it must be resolved in favor of the property owner. These principles are firmly established.
>
> As stated in *Currier* v. *Marietta & C. R. Co.*, 11 Ohio St. 228, 231: 'There is no rule more familiar or better settled than this: That grants of corporate power, being in derogation of common right, are to be strictly construed; and this is especially the case where the power claimed is

a delegation of the right of eminent domain—one of the highest powers of sovereignty pertaining to the State itself, and interfering most seriously, and often vexatiously, with the ordinary rights of property.'

See *Miami Coal Co.* v. *Wigton*, 19 Ohio St. 560; *Cincinnati* v. *Louisville & N. R. Co.*, 88 Ohio St. 283, 102 N. E. 951; *Moorhead* v. *Little Miami R. Co.*, 17 Ohio, 340, 353; and *Parkside Cemetery Asso.* v. *Cleveland, B. & G. Lake Traction Co.*, 93 Ohio St. 161, 112 N. E. 596, Ann. Cas. 1918C, 1051.

In *Moorhead* v. *Little Miami R. Co.*, *supra*, at page 351 of 17 Ohio, it is said: 'The general rule requiring grants of this nature to be strictly construed is, in our opinion, the only safe one, and it should be adhered to with unyielding tenacity.'

And at page 353: 'It is the duty of the court in such a case to keep them strictly within their granted powers, and, if the necessity of the case requires an enlarged power, to force them to seek it at the hands of the legislature.'

1 Lewis on Eminent Domain, 3d Ed. 388, declares: 'All grants of power by the government are to be strictly construed, and this is especially true with respect to the power of eminent domain, which is more harsh and peremptory in its exercise and operation than any other. "An act of this sort," says Bland, J., "deserves no favor; to construe it liberally would be sinning against the rights of property." '

* * * * * * *

It must be conceded that the use for which the property is taken must be a public use, and that the property must be taken. No other situation is referred to in the constitution, and under the well settled rules we have above referred to

the owner has the right to insist that the taking must be within the power granted by the constitution, and, if it be conceded that the legislature may define the nature of the use for which the private property may be taken for the public, then it is equally well settled under the rules above stated that the legislation defining and granting such power must be strictly construed in favor of the property owner, and that those asserting the power must be confined within the limits of the legislative grant.

Judge Cooley in his Constitutional Limitations, 7th ed. at page 780, in stating that whatever may be incidentally necessary for public use of the land taken may also be appropriated, says 'Express legislative power, however, is needed for these purposes; it will not follow that, because such things are convenient to the accomplishment of the general object, the public may appropriate them without express authority of law; but the power to appropriate must be expressly conferred, and the public agencies seeking to exercise this high prerogative must be careful to keep within the authority delegated, since the public necessity cannot be held to extend beyond what has been plainly declared on the face of the legislative enactment.'

In *Giesy* v. *Cincinnati, W. & Z. R. Co.*, 4 Ohio St. 308, this court said at page 326: 'If the legislature, by a direct exercise of authority, should undertake to appropriate property for purposes beyond the scope of this power; or if any subordinate agency, under a power properly conferred, should abuse the authority by using it irregularly, oppressively, or in bad faith, there can be no doubt

of the power of the courts to furnish an effectual remedy against such illegal acts.'

It must, of course, be conceded that where land is needed for public purposes, such as public buildings, public squares, parks, boulevards, streets, or highways, ditches, drains, or watercourses, there is full authority to appropriate the land, and the fee simple title may be taken, or a mere easement, such as a right of way, or a limited term, or any interest less than a fee may be taken; but the use must always be a public use, and the land or the interest therein must be taken by the public. Where private property is taken against the will of the owner under the power of eminent domain, it is a prerequisite that possession, occupation, and enjoyment of the property by the public, or by public agencies, are sought and are necessary.

The natural import of the words 'taken for public use,' used in our constitution, is that the thing is to be used by the public or by some agency for the public. As stated by Lewis in his work on Eminent Domain, 3d ed. 258, p. 506: 'Public use means the same as use by the public, and this, it seems to us, is the construction the words should receive in the constitutional provision in question. The reasons which incline us to this view are: First, that it accords with the primary and more commonly understood meaning of the words; second, it accords with the general practice in regard to taking private property for public use in vogue when the phrase was first brought into use in the earlier constitutions; third, it is the only view which gives the words any force as a limitation, or renders them capable of any definite and practical application.'

These principles are supported in *Healey Lumber Co.* v. *Morris*, 33 Wash. 490, 63 L. R. A. 820, 39 Am. St. Rep. 964, 74 Pac. 681; *Arnsperger* v. *Crawford*, 101 Md. 247, 70 L. R. A. 497, 61 Atl. 413; *Brown* v. *Gerald*, 100 Me. 351, 70 L. R. A. 472, 109 Am. St. Rep. 526, 61 Atl. 785; *Gaylord* v. *Sanitary Dist.*, 204 Ill. 576, 63 L. R. A. 582, 98 Am. St. Rep. 235, 68 N. E. 522; *Cozard* v. *Kanawha Hardwood Co.*, 139 N. C. 283, 294, 1 L. R. A. (N. S.) 969, 111 Am. St. Rep. 779, 51 S. E. 932; and *Albright* v. *Sussex County Lake & P. Commission*, 71 N. J. L. 303, 69 L. R. A. 768, 108 Am. St. Rep. 749, 57 Atl. 398, 2 Ann. Cas. 48.

No exact definition of the term 'public use' has been agreed upon by the authorities, and of course there is difficulty in formulating an accurate definition that would be comprehensive and satisfactory.

Nichols in his work on Eminent Domain, 2d ed. 45, discusses the term and says:

'A definition of public use which, while not concise, is consistent in all particulars with the weight of judicial authority, is accordingly the following:

'It is a public use for which property may be taken by eminent domain: (1) To enable the United States, or a state, or one of its subdivisions to carry on its governmental functions and to preserve the safety, health and comfort of the public, whether or not the individual members of the public may make use of the property so taken, provided the taking is made by a public body; (2) to serve the public with some necessity or convenience of life which is required by the public as such, and which cannot be readily furnished without the aid of some governmental power,

whether or not the taking is made by a public body, provided the public may enjoy such service as of right; (3) in certain special and peculiar cases, sanctioned by ancient custom or justified by the requirements of unusual local conditions, to enable individuals to cultivate their land or carry on business in a manner in which it could not otherwise be done, if their success will indirectly enhance the public welfare, even if the taking is made by a private individual and the public has no right to service from him or enjoyment of the property taken.'

* * * * * * *

'Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law as the legislature, under the governing and controlling power vested in them by the Constitution, may think necessary and expedient.

'This is very different from the right of eminent domain, the right of a government to take and appropriate private property to public use, whenever the public exigency requires it.'

No one would contend that it is not proper to expend public money in the acquisition, care, and adornment of public parks. They contribute to the mental as well as to the physical improvement of the people, and their esthetic value in large commercial and industrial centers is very great.

When the acquisition of private property is necessary for the promotion of these laudable objects, the owner of it must yield in the interest of the public welfare, but the makers of the Consti-

tution included in its guaranties that the private property could only be taken for a public use after compensation therefor had been first made. This is the only way that it can be legally taken for the public use in Ohio.

The police power is a very elastic and undefined thing. Within the past generation it has been given a constantly widened interpretation. By its application the range of governmental authority and activity has been greatly extended. It is of vast importance that this tendency shall not be indulged so far as to materially weaken the guaranties of our written Constitutions, under which our country and our nation have advanced to their present pre-eminent place in the world, which have been so helpful and so assuring to the individual citizen, and which were secured after long and arduous struggle. This court has, in many instances, asserted the superiority of the fundamental law and the duty of the courts to uphold it, *State ex rel. Campbell* v. *Cincinnati Street R. Co.*, 97 Ohio St. 283, 309, 119 N. E. 735, and *Cincinnati* v. *Harth*, 101 Ohio St. 344, 353, 13 A. L. R. 308, 128 N. E. 263.

To permit by an appropriation proceeding the ingrafting on the property of the plaintiff in this case of rights and privileges of the *uncertain and indefinite* character set forth in the petition would be a disregard of guaranteed rights of the plaintiff.

The judgment below will be reversed.

Marshall, Ch. J., and Hough Wanamaker, Robinson, Jones, and Matthias, JJ., concur.

Pontiac Imp. Co. v. *Cleveland Metropolitan Park Dist.*, (Ohio) 23 A. L. R. 866, l. c. 870 *et seq.*"

Decisions of Kansas Supreme Court.

We do not find where the precise questions involved here have ever been before any court, but there are several decisions of the Supreme Court of Kansas which are valuable here as illustrative of the trend of judicial opinion in that State upon the general principles underlying the law of eminent domain as exemplified by the decisions of other jurisdictions.

In *Railway Company* v. *Need as sheriff*, 2 Kans. Appeals, 492 l. c. 494, we find the following expression:

> "The right of eminent domain grows out of the necessities of the public, and is enforced only for public or *quasi* public uses. This right may be, and generally is, delegated to railroad corporations to enable them, without hindrance or delay, to construct their roads through the lands of private owners. *When the necessity for the exercise of such right does not exist recourse cannot be had to it.*"

In *Challis* v. *Santa Fe*, 16 Kans. 117, we quote from the opinion, l. c. 126:

> "It is said that 'The right to appropriate private property for public use has always been limited to the actual necessities of such use,' and that an easement is all that is necessary to secure to the railroad company the fullest possible enjoyment of the land for its purposes. All this may be true; but the question of the necessity is one for the legislature, and not for the courts. It is said by Cooley in his work on Constitutional Limitations, p. 558, that, 'It seems, however, to be competent for the State to appropriate the title

to the land in fee, and so to altogether exclude any use by the former owner, except that which every individual citizen is entitled to make, if in the opinion of the legislature it is needful that the fee be taken.' True, in a note he says, 'We think it would be difficult to demonstrate the necessity for appropriating the fee in case of any thoroughfare; and if never needful, it ought to be held incompetent.' But notwithstanding this suggestion in the note, we think the doctrine of the text fully sustained by the authorities. *Moore* v. *City of New York*, 4 Sandf. 456; *Heyward* v. *Mayor of New York*, 3 Seld. 314; *Reesford* v. *Knight*, 1 Kernan, 308; *Beekman* v. *S. & S. Rld. Co.*, 3 Paige, 75; Pierce on Am. Rld. Law, 161; *Halderman* v. *Penn. Cent. R. R.*, 50 Penn. St. 425; *Waterworks Co.* v. *Burkhart*, 41 Ind. 364; *Dingley* v. *City of Boston*, 100 Mass. 544; *Brooklyn Park Comm'rs* v. *Armstrong*, 45 N. Y. 234; *Coster* v. *N. J. Rld. Co.*, 3 Zab. 227; *P. & R. I. Rld. Co.* v. *Birkett*, 62 Ill. 332; *Bal. & G. Rld. Co.* v. *Davis*, 2 Dev. & Bat. 451; *State* v. *Rives*, 5 Iredell, 297; *DeVaraigne* v. *Fox*, 2 Blatch. C. C. 95. In this last case the law is thus stated: 'In the exercise of its power to devote private property to public use, the legislature are the exclusive judges of the degree and quality of interest which are proper to be taken, as well as of the necessity of taking it.' "

While Mr. Justice Brewer in this opinion holds that the question of necessity is one for the legislature, *yet the legislature must determine the question of necessity and must determine it for a public purpose.* Should the legislature determine that it was necessary to appropriate private property for some purely pri-

vate purpose, the courts would not allow such determination to stand, but before the court could analyze the legislative determination there would of necessity have to be a determination, and an announcement by the legislature of the purpose to which the land will be put.

In the case of *Railroad* v. *Railroad*, 28 Kans. 453, Brewer J., made use of this expression:

> "*It* (the power of eminent domain) is a power which may be exercised whenever the necessity of the public requires * * *."

In the case of *Jackheck* v. *Commissioners of Shawnee County*, 53 Kans. 780, Horton, C. J., made use of the following language in the opinion:

> "Further, it is insisted that the legislature has no power to pass an act authorizing the taking of private property for a court house site.
>
> " 'The necessity, expediency or propriety of exercising the power of eminent domain, and the extent and manner of its exercise, are questions of general public policy, and belong to the legislative department of the government' (Lewis, Em. Dom., Sec. 162).
>
> "The legislature, in providing for the condemnation of private property, must determine in the first instance whether the use for which it is to be condemned is a public one. But this determination is not final. Whether a particular use is public or not is a question for the judiciary.
>
> " 'But property taken for public buildings of all kinds, such as court houses, jails, public schools, markets, almhouses, and the like, is taken for public use. The right has been questioned in some decisions, but never denied in any decided case'

(Lewis, Em. Dom., Sec. 174; Cooley, Const. Lim., 6th ed. ch. 15, p. 665).

"In this particular case, whether the requisite necessity existed to authorize the taking of the plaintiffs' lots was determined by the commissioners of Shawnee County and by the judge of the district court of that county, when he passed upon the application presented to him for the appointment of appraisers to make the condemnation. Subsequently, in this action, the District Court of Shawnee County, re-examined the proceedings for the condemnation, and, in refusing the injunction prayed for, affirmed that the requisite necessity existed for the taking of the lots. Under all of these circumstances, this court will not interfere by declaring that no such necessity existed for this compulsory mode to procure or complete the site for the court house."

Here it is said that in the condemnation of private property the legislature *must determine* in the first instance whether the use for which it is to be condemned is a public one. *Has the Kansas Legislature yet determined even what use is to be made of this property*, much less that it is a public use? Obviously not, for it leaves the determination of what shall be done with this land for a *future* legislature upon the recommendations and report of a board appointed by the governor, charged with the duty of looking over and seeing what is necessary and proper to be done.

In 63 Kans., *Irrigation Co.* v. *Klein*, 484, the court says, pp. 488, 489:

"It is a basic principle of our form of government that no person can be deprived of life,

liberty or property except by due process of law. It is equally fundamental that the legislature possesses no power to take the property of any one and give it to another for the advancement of simply private objects. To argue these propositions or State authorities in their support would be but a pedantic display of learning. It is equally well settled that the legislature may authorize the taking of private property by private persons or corporations for public uses, the owner of such property being compensated therefor. Courts determine what is a public use; legislatures when the power of eminent domain may be exercised in its promotion. Courts may not interfere to limit or control the discretion of the lawmaking power as to the character, quality, method or extent of the exercise of the power of eminent domain by a private person or corporation engaged in the promotion of a public use, when once it has been determined that such use is a public one. This being so, they should be careful in pronouncing upon the question as to whether a given project is such a public use as to permit the exercise of the power of eminent domain in its promotion. * * *

"It is a very difficult matter to define what is a public use. Courts of last resort have departed quite widely from one another in the effort. The local conditions and needs of the people have much to do with the question. Wet countries need ditches and dikes, dry countries irrigation. Yet necessity is not definitive of a public use. Without attempting a definition, we may state that we find no difficulty in coming to the conclusion that the promotion of irrigation in this State is a public use, and that the legislature is

authorized in its discretion to commit the power of eminent domain to private persons or corporations for its promotion. Indeed, we understand that there is no serious contention by either party as to the correctness of this conclusion, and we have made these remarks more by way of inducement than demonstration."

A use, to be public, must be fixed and definite. *Fallsburg Power & Mfg. Co. v. Alexander*, 101 Va. 98, 61 R. A. 29; 9 American State Reports, 855, and *Nichols v. Central Virginia Power Company*, 44 A. L. R., l. c. 732.

Leases.

Section 8 of Chapter 7 of the Laws of Kansas 1927, being the Appropriation Bill (R. 10), is as follows:

"Section 8. If at the time the said real estate is reduced to the possession of the State of Kansas any of the buildings thereon are occupied by any person holding a valid lease thereon from any of the former owners, the said board may, in its discretion, and with the approval of the governor, permit such tenants to remain on the said premises for the period of such lease or a part thereof, upon the payment to the State of Kansas of the same amount of rents payable under such lease to the former owners thereof; and all sums received from such rents, and any moneys received by gifts, shall be deposited in the State treasury and are hereby reappropriated to the said board for the purposes herein set out."

We regard this as being indicative of the absence of any present, known specified use on the part of the State, which here assumes the attitude that this property should be *rescued* from private ownership, and the title to the fee transferred to the public, and then, in addition to checking the entire matter of purpose and use up to a governor's board to be thereafter appointed, it gave that board full and ample authority *to make no use of the property whatsoever*, but to continue in effect the relationship of landlord and tenant and to suffer the tenants to remain on the premises indefinitely. We say indefinitely because there is nothing in any of the legislative acts or any place in this case that discloses the tenure of the lessees, or the terms of their grants.

It is unnecessary to cite authorities to the effect that the entire estate, including leaseholds, could be condemned as well as the fee. The State did not have to extend any privilege to tenants, but if it had any use to which this property was to be put, it could condemn everything necessary to place it in possession of the property at once, and when it disclaimed an intention to dispossess the tenants occupying the several tracts of land, it in effect announced that there was no immediate use in contemplation. So far as this record is concerned, these tenants may have been occupying the property under ninety-nine year leases. One year is the same as ninety-nine so far as the principle involved is concerned.

So far as the enactments of the Kansas Legislature upon the subject of use are concerned the prop-

erty condemned may be used for farms, truck gardens and pastures for an indefinite period in the future. Section 8 of the Resolution, *supra*, authorizes the board appointed by the governor to rent the property to tenants under the terms of existing leases, if such leases are found to be in existence *at the time the real estate is reduced to the possession of the State.*

One tenant, occupying one building under a lease, appeared in the case and asked to be made a party (R. 33 L. H. Trotter) and entered his appearance and took leave to answer, and the court adjudicated the value of his leasehold interest at $1,000 thus eliminating him (R. 44). The record does not disclose any action taken as to the other lessees, but it does disclose legislative permission to the board which should make a survey of the property and recommendations for its use, to continue the leases in effect upon the payment of the rent, and thus so far as these legislative acts are concerned, if there is any use disclosed, it is that the State of Kansas should acquire this property by condemnation to be used as rental property to tenants and obviously this could not be a public use.

Viewed in the light of Section 8 *supra*, it clearly becomes apparent that the legislative intention was to transfer the title in all events in order to "rescue the property from private ownership" without any idea of what might be made out of it or for what it might be used.

The legislature in effect directs:

1. Get the fee title to the property;
2. Let the tenants continue to farm it or occupy the houses.

3. Organize a board and have the place surveyed;

4. Have this board report sometime in the future its recommendations; and

5. Let some other legislature decide what use will be made of the place.

We have referred to this matter solely because it seems to throw additional light upon the subject under consideration, to-wit; that there was no use specified or known or designated before the taking, and that no part of the proceedings provided that the property should be appropriated by the State for any particular use or for any public use.

Had it designated at any point in any of its legislative pronouncements, beginning with the original statute and ending with the Appropriation Bill, the use to which this property should be put, or the public and unmistakable purpose for which it is condemned, we would not be presenting this case. It might be said that it was condemning the property for a shrine, the purpose assigned by the Supreme Court of Kansas, and had it done so, we would at least have been deprived of the point we have made and been limited perhaps, if the matter were contested, to a debate on whether or not a shrine constitutes a public use.

It might have announced that it purposed to condemn this property to be used as a park, or as a monument and memorial, but all such indicia of use and purpose are conspicuous in these several acts by reason of their absence.

To know the proposed use was not only the right of plaintiff in error, but a valuable thing in connection with the damages she sustained to her remaining lands.

Under the law of this State where land is condemned, the owner is entitled to compensation to the extent of the value of the land taken and for injuries to and depreciation of the remainder of the tract, and in determining the damages to which he is entitled, consideration may be given to the character of the improvement and its effect upon the part of the tract not taken, including interference with access to the tract and the use to which it is devoted and reasonably adapted.

Smith v. *Wyandotte County*, 113 Kan. 244.

In that case, the Chief Justice of the Kansas Supreme Court in the opinion, made use of the following language:

> "He (the plaintiff), was entitled to recover the market value of the land taken, and any damages which resulted from the improvements to the remaining portion of his farm. It constituted an entire parcel and the inquiry as to the effect the taking of a part had upon the whole was proper. This included the character of the improvement which the defendant proposed to make and its effect upon the remaining portion of the farm. Any depreciation resulting from interference with ingress to and egress from the highway or which made a retaining wall necessary, or, if the grading of the embankment was such as to deprive him of the use of a portion of the land not taken, and all actual losses resulting from interference with the use of the farm caused by

the improvement of the highway, were proper matters for consideration in determining the recoverable damages."

Thus it appears that the inquiry as to the effect of taking includes the character of the improvement which the defendant proposes to make and its effect upon the remaining portion of the land. That was a case where the county condemned land to widen and improve a road, and the contemplated improvement called for the making of a deep cut in front of plaintiff's property. The character of the improvement thus was an essential element in determining the amount of the damages. In the case at bar, there is no possible way for plaintiff in error to know the character of the proposed development and whether it will be beneficial or harmful to her remaining property.

Such being the law of the State where the land is situated, she had a property right in the damages which she would sustain by the taking of a portion of her land, and she has been deprived of this right without due process when the States takes the land for an undisclosed, secret, unknown use which prevents the ascertainment and assessment of such damages.

The Gettysburg Case.

Considerable importance was attached in the trial of this case in the court below to the well known decision in the case of *United States v. Gettysburg Electric Railway Company*, 160 U. S. 668, and we anticipate that case will be relied upon by defendants in error in this proceeding. It seems to be the only case in our

judicial history where there appears even a suspicion that land has been condemned by a sovereign because of its historical interest, but in condemning this land at Gettysburg, it must be noted that while the historical value of the battlefield and the desirability of its preservation may have been the underlying motives which activated the Congress, nevertheless Congress in paving the way for its expropriation did the thing which we say the Kansas Legislature omitted to do, namely, it *designated the purpose in unmistakable terms and the use to which the land was to be put.*

The title of the act authorizing the condemnation of the Gettysburg battlefield is:

> "AN ACT TO AUTHORIZE CONDEMNATION OF LAND FOR SITES OF PUBLIC BUILDINGS, AND FOR OTHER PURPOSES."

The title at least disclosed a purpose, or a plurality of purposes, and disclosed some purposes which would in the very nature of things be public. Observe the title to the act of the Kansas Legislature, Laws of 1921, Chapter 271, as follows:

> "AN ACT TO PROVIDE FOR THE CONDEMNATION OF CERTAIN LAND POSSESSING A SPECIAL HISTORICAL INTEREST FOR THE USE AND BENEFIT OF THE STATE AND ALLOWING THE LEGISLATURE TO MAKE APPROPRIATION THEREFOR."

In this title the designation of a use and purpose cannot be found. The language that "it is to be condemned for the use and benefit of the State" is surplusage, and does not give any information. Obviously any land which

can be condemned, must be condemned for the use and benefit of the State either mediately or immediately. The whole theory of the principle of eminent domain is bottomed upon the proposition that private property is forcibly taken from the owner for the use and benefit of the State, but the act is barren unless a use which can be analyzed and found to be a public one is specified therein.

There was no doubt of the use and purpose proposed in the Gettysburg condemnation matter. In the statement of the case by Mr. Justice Peckham, we find that the Congress had definitely and specifically announced the proposed use of the land not only in the act authorizing its condemnation but in the act appropriating money therefor. We append the entire decision to this brief because a study of it is interesting and we comment on it at some length, but for immediate purpose of reference we quote the statement of facts only, as follows (italics ours):

> "Statement by Mr. Justice Peckham: These are two writs of error to the Circuit Court of the United States for the Eastern District of Pennsylvania. They involve the same questions.
>
> By the act of Congress, approved August 1st, 1888 (Chap. 728), entitled 'An Act to Authorize Condemnation of Land for Sites of Public Buildings and for Other Purposes,' it is provided 'that in every case in which the secretary of the treasury, or any other officer of the government, has been or hereafter shall be authorized to procure real estate for the erection of a public building or for any other public uses, he shall be and hereby is authorized to acquire the same for the United States by condem-

nation, under judicial process, whenever in his opinion it is necessary or advantageous to the government to do so.'

By the Act of Congress, approved March 3, 1893, generally called the sundry civil appropriation act, it was provided among other things, as follows: '*Monuments and tablets at Gettysburg. For the purpose of preserving the lines of battle at Gettysburg, Pa., and for properly marking with tablets the positions occupied by the various commands of the Armies of the Potomac and of Northern Virginia in that field, and for the opening and improving avenues along the positions occupied by the troops upon those lines, and for fencing the same, and for determining the leading tactical positions of batteries, regiments, brigades, divisions, corps and other organizations, with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets, each bearing a brief historical legend, compiled without praise and without censure*, the sum of $25,000 to be expended under the direction of the Secretary of War.'

Subsequently to the passage of that act and on the 6th of June, 1894, a joint resolution of Congress was approved by the president, which, after reciting the passage of the act of 1893, and the appropriation of the sum of $25,000 thereby, contained the further recital that the sum of $50,000 was then under consideration by Congress as an additional appropriation *for the same purposes*, and that it had been recently decided by the United States Court, sitting in Pennsylvania, that authority had not been distinctly given for the acquisition of such land as may be necessary to enable the War Department to execute *the purposes declared in the act* of 1893, and that there was imminent danger that

portions of the battlefield might be irreparably defaced by the construction of a railroad over the same, thereby making impracticable the execution of the provisions of the act of March 3rd, 1893. It was therefore 'Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that the Secretary of War is authorized to acquire by purchase (or by condemnation) pursuant to the act of August 1, 1888, such lands, or interest in lands, upon or in the vicinity of said battlefield, as in the judgment of the Secretary of War may be necessary for the complete execution of the act of March 3, 1893: Provided, that no obligation or liability upon the part of the government shall be incurred under this resolution, nor any expenditure made except out of the appropriations already made and to be made during the present session of this Congress.' A further appropriation $50,000 was made for *this purpose* by the act of August 18, 1894, the same session of Congress.

Acting under the authority of these various statutes and joint resolution, the United States District Attorney for the Eastern District of Pennsylvania, by direction of the Attorney General, filed a petition in the name of the United States for the purpose of condemning certain lands therein described, *for the objects mentioned in the acts of Congress.*

The petition in the first case recited the foregoing facts, and also stated the inability to agree with the owners upon the price of the land desired, and asked for the appointment of a jury, according to the law of the State of Pennsylvania in such case provided. The 2d section of the act of Congress, approved August 1, 1888, above mentioned, provides

that the practice, pleadings, forms and modes of proceedings are to conform so far as may be to those existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held. The Gettysburg Electric Railway Company answered this petition, and set up the fact that it was a corporation existing under the laws of Pennsylvania, and that by virtue of its charter it had the power to build its road along a certain portion of the Gettysburg borough limits, described in the answer; that it had acquired as a part of a route of one of the branches of its road, and for the purpose of using the same as a part of its right of way, the tract of land particularly mentioned and described in the petition, and which is the subject of the condemnation proceedings. It alleges that the effect of the condemnation of the strip of ground would be to cut off a particular branch railway or extension belonging to it, and destroy its continuity and prevent its construction and operation. The company further answered that the greater part of the appropriation of $2,000, under the act of March 3, 1893, had already been expended *for the purposes stated therein*, and that the balance remaining to the credit of the appropriation was less than $10,000. The electric railway company afterwards filed a further or amended answer and therein set forth that the entire balance remaining unexpended of the appropriation of $25,000, under the act of March 3, 1893, and of $50,000 which had been appropriated by the act approved August 18, 1894, were covered by contracts already made under the authority of the Secretary of War, and that there was not, in point of fact, at that time any part of either appropriation available for the purpose of paying any judgment which might be re-

covered by the company in these condemnation proceedings.

Evidence was given on the question of the value of the land to be taken, and on the 5th of November, 1884, the jury filed a report awarding the sum of $30,000 as the value of the land proposed to be taken in the first or main proceeding. The Gettysburg Electric Railway Company duly filed exceptions to the award, and on the same day appealed therefrom. The United States also appealed. The case was argued, and in April, 1895, an order was entered that the first and second exceptions filed by the defendant be sustained and that the petition of the United States be dismissed. Those two exceptions are as follows:

'1. The Act of Congress approved August 1, 1888, provides for the acquisition of real estate by the United States by condemnation only for the erection of public buildings or for other public uses. It does not appear in the petition of Ellery P. Ingham, Esq., United States attorney, that the Secretary of War has been authorized to procure the tract of land mentioned in the 5th paragraph thereof, belonging to the Gettysburg Electric Railway Company, for the erection of a public building or for other public uses. *The purposes named* for the expenditure of the appropriation in the Act of Congress of March 3, 1893, *are not such public uses* as authorize the condemnation by the United States of the real estate of private persons.'

'11. The *purpose specified* in the 6th paragraph of the said petition, namely, "of preserving the lines of battle," "properly marking with tablets the positions occupied," and "determining the leading tactical positions of batteries, regi-

ments, brigades, divisions, corps, and other organizations with reference to the study and correct understanding of the battle, and to mark the same with suitable tablets," are none of them public uses or purposes, authorizing the condemnation by the United States of private property.'

The second proceeding was taken for the purpose of condemning a certain other portion of land containing a little over 2 acres. There was no trial in that matter, but the case was dismissed, under the motion made by the defendant to quash the proceedings, upon the same grounds stated in the main case.

The substance of the holding of the circuit judge was that *the intended use* of the land *was not that kind of a public use* for which the United States had the constitutional power to condemn land. The district judge dissented from that view and was of the opinion that the use was public, and that the United States had the power to condemn land for that purpose.

U. S. v. Gettysburg Electric Railway Co., 160 U. S. 668."

A reading of the facts in this celebrated case at once shows the distinction between it and the case at bar. There the use to which the land was to be put was definitely and specifically set forth by the Congress and required no interpretation of the acts by the court to learn precisely and how extensively the condemned land would be improved. One could visualize the completed improvements from the reading of the Act of 1893. However much it may be thought that the underlying motive was to preserve the battlefield be-

cause of its historical interest, the fact remains that the Congress in writing the legislation for its condemnation did specifically point out the particular use and purpose to which it was to be put, and did specifically designate a public purpose. In the opinion (appendix) the court constantly refers to "proposed use." The court said: "the purpose or the use is stated in the first Act of Congress • • • and is noted in the above statement of facts." The Appropriation Act of August 18, 1894 also contained the following:

> "For continuing the work of surveying, locating, and preserving the line of battle at Gettysburg, Pennsylvania, and for properly opening, constructing and improving avenues along the positions occupied by the various commands of the Armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase at private sale or by condemnation of such parcels of land as the Secretary of War may deem necessary for the sites of tablets and for the construction of the said avenue, and determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps and other organizations with reference to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure."

The court continues:

> *"In these Acts of Congress and in the joint resolution the intended use of this land is plainly set forth."*

This case thereupon developed into an analysis of the intended and well known use to ascertain whether or not it was in fact a public use. The question in the case at bar is eliminated in the Gettysburg case by a study of the Acts and Resolutions of Congress and by this court when it was instantly decided *that the intended use is plainly set forth.* There was no mystery or secret or doubt or uncertainty as to precisely what would be done with the land. It was not left to some future board to make a survey and recommend to some future Congress what might be done, which might then proceed to adopt or reject or modify the recommendations but the original acts definitely and clearly settled this question, leaving nothing thenceforth to be done in the way of fixing the use. There was nothing in these Acts of Congress which gave any future officer or board the power to rent the land out and to assume the role of a governmental landlord as in the case at bar.

It is true that in the opinion much is said as to why the object to be attained is a laudable one, but the opinion as to those matters is germane to the decision that the *announced and intended use* was a public one. In that case, the court was called upon to analyze the *quality of the use expressed* in the Acts of Congress, while in this case, the court is called upon to pass upon the validity of an act of the legislature which gives no use whatever and which, therefore, is not subject to analysis.

It seems apparent, therefore, that the Supreme Court of Kansas was in error when it decided that a use was specified in the act, and of course, if that

is true, it was in error in deciding that the use was a public one, and therefore, we respectfully urge that its decision is contrary to and in conflict with the weight of authority both federal and state upon a fundamental principle of the law of eminent domain.

POINT B.

The statute and proceedings involved violate substantial rights of plaintiff in error under the provisions of the Fourteenth Amendment to the Constitution of the United States, and do not constitute "due process of law."

The plaintiff in error takes the position that the condemnation of her private property by the State of Kansas under the acts previously discussed, where no specified use or purpose is shown violates her rights under the Fourteenth Amendment to the Constitution of the United States. We are not unmindful of the expressions of this court in cases of this kind where judgments of State courts are presented for review, to the effect that the judgments of the State courts are regarded with great respect upon what should be deemed *public use* in that State, but we respectfully call attention to the fact that those cases have turned upon an analysis of the State court of a definitely known, ascertained, and specified use, as to which this court has deferred to the judgment of the State court. In the classification of the various uses said to be public for which land has been condemned, different States and different places have different necessities and demands with the result that many uses have been held to be public in certain localities and held

to be private in others. We are not here called upon to discuss the difference between private and public use, but we do have in this case what would seem to be a basic question in the law of eminent domain where a State has attempted to take private property for no known or ascertained use whatever. We believe this injects into the case a question not present in other cases which have been presented to this court, and in so doing there is presented a clear case of deprivation of private property without due process of law. We take the liberty of quoting from the text in Ruling Case Law, as follows:

> "Constitutional Limitations—The power of eminent domain is of course to be exercised in subjection to all the prohibitions found in the Constitutions of the United States and of the several states; but the provisions by which the power is chiefly limited are (1) that property shall not be taken for public use without just compensation; (2) that no person shall be deprived of his life, liberty or property without due process of law. The first of these provisions, although not limited in its application so as to exclude any form of actual taking of property, is considered to have been intended especially to govern the exercise of the power of eminent domain, and is applied to that power more literally than to the other branches of sovereign authority. It is contained in the Fifth Amendment to the Constitution of the United States. That amendment does not however restrict the powers of the states, but is a limitation on the powers of the United States only. The same provision is in substance found in the constitution of nearly every state. The construction of this

provision, simple as it seems, has given rise to at least five serious controversies over which the courts have divided themselves into conflicting schools, viz.: (1) to what powers does it apply, (2) what is a 'public use,' (3) what is a 'taking,' (4) what is 'property,' (5) what is 'just compensation.' The greater part of this article will be devoted to examining these controversies.

"Due Process of Law.—The requirement of due process of law is found in the Fifth Amendment to the Constitution of the United States, but the restriction applies only to the Federal Government. In 1868 the fourteenth amendment was adopted prohibiting the states from depriving any person of his property without due process of law. A like provision already existed in most of the state constitutions, although in some of them the phrase, 'the judgment of his peers or the law of the land,' was used instead of 'due process of law.' The requirement of due process of law is of general application, and is most often invoked to resist laws of a regulatory nature, enacted under the police power, but it covers the power of eminent domain as well. In the cases of takings of property by eminent domain under supposed authority of Congress, the due process clause of the fifth amendment is rarely invoked, as the portion of the same amendment specifically aimed at eminent domain forbidding taking without compensation is more directly in point; and the same is true of the requirement of due process or the law of the land in the state constitutions, with reference to takings under state authority. It is of course well established, that a taking of property by authority of a state for a public use on payment of just compensation, although a drastic interference with private rights

of property, is, when effected in accordance with a statute which affords the owner a reasonable opportunity to be heard on the question of damages, due process of law within the meaning of the constitutions because eminent domain was a recognized function of government when the constitutions were adopted. It is settled however that a taking of property which does not comply with the specific clause—that is, a taking for a private use or without just compensation—is a deprivation of property without due process of law, and accordingly, since the adoption of the fourteenth amendment, there is the possibility of a federal question in every taking by eminent domain under state authority, even if all the requirements of the constitution of the state are held to have been complied with. The due process clause, in addition to its requirement of public use and just compensation, protects the land owner from the adoption of any form of procedure in eminent domain cases which deprives him of a reasonable opportunity to be heard and so to present such objections and claims as he is entitled to make. The state courts have occasionally held an attempted taking of property for a use not public or without just compensation unconstitutional as denying due process when the specific provision against taking without compensation had not been adopted in the constitution of the state or when the court was not fully satisfied as to its applicability. It is open of course to a state court to deny the validity of an act of its own legislature on account of its inconsistency with the due process clause in the federal constitution, and this is occasionally done in eminent domain cases.

"Other Constitutional Limitations.—There are other provisions of the state and federal constitu-

tions which affect to a less important extent the exercise of eminent domain, among them the interstate commerce clause of the federal constitution and the prohibition against the impairment of the obligation of contracts in the same instrument; also the provisions in regard to jury trial in both state and federal constitutions. In many of the states in recent years constitutional amendments have been adopted specifically aimed at eminent domain and limiting the exercise of that power by the public in favor of the individual owner of property. The most important of these are the requirement of compensation when property is damaged, of payment of compensation in advance, and of jury trial; and provisions that the necessity of a taking shall be a judicial question, that courts, in deciding whether a use is public, shall not be influenced by the declaration of the legislature, and that benefits shall not be set off against compensation or damages. On the other hand, in some of the states the constitutions specifically authorize the exercise of eminent domain on conditions under which the customary general provisions have been held to prohibit it." 10 R. C. L. 15-18 (Eminent Domain, Secs. 13, 14 and 15).

"Requirements of Federal Constitution.—It has already been explained that a taking of property for private use cannot be authorized by Congress without violating the Fifth Amendment to the Constitution of the United States, and that such a taking when authorized by a state is in violation of the fourteenth amendment. Occasionally it happens that a decision of a state court that a taking is for a public use, involving only the constitutionality of a state statute under the usual constitutional provisions, is brought before the Supreme

Court of the United States under the due process clause. Such questions more frequently arise under special constitutional provisions found in several of the states declaring certain uses as public which are generally not considered such. Such provisions are of course binding on the state courts so far as the constitution of the states are concerned, but they cannot override the fourteenth amendment; and a state statute which provides for the taking of property for a private use, though specifically authorized by the constitution of the state, would be overturned by the Supreme Court of the United States, or even by the highest court of the state itself, since the federal constitution is binding on the courts of every state, notwithstanding any provision in its own constitution. Especially would this be the case when the state constitution does not declare a certain use to be public, but merely provides that property might be taken for that use, even if it was private." 10 R. C. L. 28 (Eminent Domain, Sec. 25).

The case of *Missouri Pacific Railway Company v. State of Nebraska, ex rel.*, 164 U. S. 403, 41 L. ed. 489, seems to sustain our contention. In the headnotes, it is said:

> "The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Amendment to the Constitution of the United States."

That case was not an eminent domain case as decided by this court but the principle here involved seems to have been announced in the opinion, as follows, l. c. 417:

> This court, confining itself to what is necessary for the decision of the case before it, is unanimously of opinion that the order in question, so far as it required the railroad corporation to surrender a part of its land to the petitioners, for the purpose of building and maintaining their elevator upon it, was, in essence and effect, a taking of private property of the railroad corporation, for the private use of the petitioners. The taking by a state of the private property of one person or corporation, without the owner's consent, for the private use of another, is not due process of law, and is a violation of the 14th Article of Amendment of the Constitution of the United States. *Wilkinson* v. *Leland*, 27 U. S. 2 Pet. 627, 658 (7: 542, 553); *Den, Murry* v. *Hoboken Land & I. Co.*, 59 U. S., 18 How. 272, 276 (15: 372, 374); *Citizens' Sav. & L. Asso.* v. *Topeka*, 87 U. S., 20 Wall. 655 (22: 455); *Davidson* v. *New Orleans*, 96 U. S. 97, 102 (24: 616, 618); *Cole* v. *La Grange*, 113 U. S. 1 (28: 896); *Fallbrook Irrig. Dist.* v. *Bradley*, 164 U. S. 112, 158, 161 (*ante*, 59); *State* v. *Chicago, M. & St. P. R. Co.*, 36 Minn. 402.
>
> *Judgment reversed*, and case remanded to the Supreme Court of the State of Nebraska for further proceedings not inconsistent with this opinion.

If the taking by a state of the private property of one person without the owner's consent for the private use of another is not due process of law and is a violation of the 14th Amendment of the Constitution of the United States as there decided, it seems obvious that the taking by a state of the private property of one person or corporation without the owner's consent for

no specified or known purpose whatever, private or public, but solely to change title and *rescue* the property from private ownership, is a violation of the 14th Amendment of the Constitution of the United Staes, and is not due process of law.

In the recent case of *Delaware, Lackawanna and Western Railroad Company* v. *Morristown*, decided February 20, 1928, this court on certiorari to the United States Court of Appeals for the Third Circuit, 72 L. ed. 274, l. c. 276, said:

> "But it is to be borne in mind that the taking of private property for public use is deemed to be against the common right and authority so to do must be clearly expressed. *Western U. Teleg. Co.* v. *Pennsylvania R. Co.*, 195 U. S. 540, 569, 49 L. ed. 312, 322, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517; Lewis, Em. Dom. 3d ed. Sec. 371; *Springfield* v. *Connecticut River R. Co.*, 4 Cush. 63, 69-72; *Holyoke Water Power Co.* v. *Lyman*, 15 Wall. 500, 507, 21 L. ed. 133, 135. Cf. *Richmond* v. *Southern Bell Teleph. & Teleg. Co.*, 174 U. S. 761, 777, 43 L. ed. 1162, 1165, 19 Sup. Ct. Rep. 778. The provision relied on is merely petitioner's authorization and the town's agreement that the municipal power of police shall be exerted for the purpose of regulating, and to carry into effect petitioner's rules in respect of, the traffic at the station. The agreement does not empower the town so to appropriate petitioner's land.
>
> Is the provision of the ordinance of October 22, 1924, declaring a part of the driveway to be a public hack stand a valid exercise of the police power? We assume that by the laws of the State the town is authorized to regulate traffic and to

establish public hack stands in its streets and other public places. It does not claim the power to take or appropriate private property for such a purpose without giving the owner just compensation, but it contends that the establishing of this hack stand 'was justified under the police power by the public necessities for the safety, welfare and comfort of the public using the driveway,' and that it does not take private property for public use without compensation 'because the lands taken are devoted to a public use.' But, assuming that under the circumstances the creation of a public hack stand would be a proper exertion of the police power, it does not follow that the due process clause of the 14th Amendment would not safeguard to the owner just compensation for the use of its property. *Pennsylvania Coal Co.* v. *Mahon*, 260 U. S. 393, 416, 67 L. ed. 322, 326, 28 A. L. R. 1321, 43 Sup. Ct. Rep. 158. The police power may be and frequently it is exerted to effect a purpose or consummate an enterprise in the public interest that requires the taking of private property; but whatever the purpose or the means employed to accomplish it, the owner is entitled to compensation for what is taken from him. The railroad grounds, station, platforms, driveways, etc., are used by the petitioner for the purposes of its business as a common carrier; and, while that business is subject to regulation in the public interest, the property used belongs to petitioner. The State may not require it to be used in that business, or take it for another public use, without just compensation, for that would contravene the due process clause of the 14th Amendment. *Reagan* v. *Farmers' Loan & Trust Co.*, 154 U. S.

362, 396, *et seq.*, 38 L. ed. 1014, 1023, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047; *Smyth* v. *Ames*, 169 U. S. 466, 523, 526, 42 L. ed. 819, 840, 842, 18 Sup. Ct. Rep. 418; *Western U. Teleg. Co.* v. *Pennsylvania R. Co.*, *supra* 571 (49 L. ed. 323, 25 Sup. Ct. Rep. 133, 1 Ann. Cas. 517); *Producers Transp. Co.* v. *Railroad Commission*, 251 U. S. 228, 64 L. ed. 239, P. U. R. 1920 C, 574, 40 Sup. Ct. Rep. 131; *Michigan Pub. Utilities Commission* v. *Duke*, 266 U. S. 570, 577, 578, 69 L. ed. 445, 449, 450, 36 A. L. R. 1105, 45 Sup. Ct. Rep. 191."

In *Chicago, Burlington & Quincy Railroad Co.* v. *City of Chicago*, 166 U. S. 226, 41 L. ed. 979, we quote the following from the headnotes:

"The prohibition of the 14th Amendment of the Federal Constitution against taking property without due process of law refers to all instrumentalities of a state, and is therefor violated whenever any person, by virtue of public position under a state government, deprives another of any right protected by that Amendment against deprivation by the state.

3. A judgment of a state court, even if it be authorized by state statute, whereby private property is taken for the state or under its direction for public use without compensation made or secured to the owner, is wanting in the due process of law required by the 14th Amendment of the United States Constitution."

In the opinion, Mr. Justice Harlan uses the following language, l. c. 235:

"But a state may not, by any of its agencies, disregard the prohibitions of the 14th Amendment.

Its judicial authorities may keep within the letter of the statute prescribing forms of procedure in the courts and give the parties interested the fullest opportunity to be heard, and yet it might be that its final action would be inconsistent with that Amendment. In determining what is due process of law regard must be had to substance, not to form. This court, referring to the 14th Amendment, has said: 'Can a state make anything due process of law which, by its own legislation, it chooses to declare such? To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation.' *Davidson* v. *New Orleans*, 96 U. S. 97, 102 (24: 616, 619). The same question could be propounded, and the same answer should be made, in reference to judicial proceedings inconsistent with the requirement of due process of law. If compensation for private property taken for public use is an essential element of due process of law as ordained by the 14th Amendment, then the final judgment of a state court, under the authority of which the property is in fact taken, is to be deemed the act of the state within the meaning of that Amendment.

It is proper now to inquire whether the due process of law enjoined by the 14th Amendment requires compensation to be made or adequately secured to the owner of private property taken for public use under the authority of a state.

In *Davidson* v. *New Orleans*, above cited, it was said that a statute declaring in terms, without more, that the full and exclusive title to a described piece of land belonging to one person

should be and is hereby vested in another person, would, if effectual, deprive the former of his property without due process of law, within the meaning of the 14th Amendment. See also *Missouri P. R. Co. v. Nebraska, Board of Transportation*, 164 U. S. 403, 417 (*ante*, 489, 495). Such an enactment would not receive judicial sanction in any country having a written Constitution distributing the powers of government among three co-ordinate departments, and committing to the judiciary, expressly or by implication, authority to enforce the provisions of such Constitution. It would be treated, not as an exertion of legislative power, but as a sentence—an act of spoliation. Due protection of the rights of property has been regarded as a vital principle of republican institutions. 'Next in degree to the right of personal liberty,' Mr. Broom in his work on Constitutional Law says, 'is that of enjoying private property without undue interference or molestation.' p. 228. The requirement that the property shall not be taken for public use without just compensation is but 'an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. Indeed, in a free government almost all other rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen.' 2 Story, Const. Sec. 1790; 1 Bl. Com. 138, 139; Cooley, Const. Lim. 559; *People v. Platt*, 17 Johns. 195, 215, 8 Am. Dec. 382); *Bradshaw v. Rodgers*, 20 Johns. 102, 106; Mount Washington Road Co.'s Petition, 35 N. H. 134, 142; Parton Road Co.'s Petition, 35 N. H. 134, 142; *Parham v. Decatur Com.*

ty Justices of Inferior Ct., 9 Ga. 341, 348; *Ex parte* Martin, 13 Ark. 199, 206 *et seq.*; *Johnston* v. *Rankin*, 70 N. C. 550, 555.

But if, as this court has adjudged, a legislative enactment, assuming arbitrarily to take the property of one individual and give it to another individual, would not be due process of law as enjoined by the 14th Amendment it must be that the requirement of due process of law in that amendment is applicable to the direct appropriation by the State to public use, and without compensation, of the private property of the citizen. The legislature may prescribe a form of procedure to be observed in the taking of private property for public use, but it is not due process of law if provision be not made for compensation. Notice to the owner to appear in some tribunal and show cause why his property shall not be taken for public use without compensation would be a mockery of justice. Due process of law as applied to judicial proceedings instituted for the taking of private property for public use means, therefore, such process as recognizes the right of the owner to be compensated if his property be wrested from him and transferred to the public. The mere form of the proceeding instituted against the owner, even if he be admitted to defend, cannot convert the process used into due process of law, if the necessary result be to deprive him of his property without compensation. In *Fletcher* v. *Peck*, 10 U. S. 6 Cranch, 87, 135, 136 (3: 162, 177, 178), this court speaking by Chief Justice Marshall said: "It may well be doubted whether the nature of society and government does not prescribe some limits to the legislative power; and if any be

prescribed where are they to be found, if the property of an individual, fairly and honestly acquired, may be seized without compensation. To the legislature all legislative power is granted; but the question, whether the act of transferring the property of an individual to the public be in the nature of legislative power is well worthy of serious reflection.'

In *Citizens Sav. & L. Assn.* v. *Topeka*, 87 U. S. 20 Wall. 655, 663 (22: 445, 461), Mr. Justice Miller, delivering the judgment of this court, after observing that there were private rights in every free government beyond the control of the State, and that a government, by whatever name it was called, under which the property of citizens was at the absolute disposition and unlimited control of any depository of power, was after all but a despotism, said: 'The theory of our government, state and national, is opposed to the deposit of unlimited power anywhere. The executive, the legislative and the judicial branches of these governments are all of limited and defined powers. There are limitations on such power which grow out of the essential nature of all free governments. Implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name.' No court, he said would hesitate to adjudge void any statute declaring that 'the homestead now owned by A should no longer be his but should henceforth be the property of B.' In accordance with these principles, it was held, in that case, that the property of the citizen could not be taken under the power of taxation to promote private objects, and, therefore, that a statute authorizing a town to issue its bonds in aid

of a manufacturing enterprise of individuals was void, because the object was a private, not a public one. See also *Cole* v. *La Grange*, 113 U. S. 1 (28:896).

In the early case of *Gardner* v. *Newburgh*, 2 Johns. Ch. 162 (7 Am. Dec. 526), there being no provision in the Constitution of the State of New York on the subject, Chancellor Kent said that it was a principle of natural equity recognized by all temperate and civilized governments, from any deep and universal sense of its justice that fair compensation be made to the owner of private property taken for public use.

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In *Scott* v. *Toledo*, 36 Fed. Rep. 385 (1 L. R. A. 688), the late Mr. Justice Jackson, while circuit judge, had occasion to consider this question. After full consideration that able judge said: 'Whatever may have been the power of the states on this subject prior to the adoption of the 14th Amendment to the Constitution, it seems clear that, since that amendment went into effect, such limitations and restraints have been placed upon their power in dealing with individual rights that the states cannot now lawfully appropriate private property for the public benefit or to public uses without compensation to the owner, etc. • • • The conclusion of the court on this question is that since the adoption of the 14th Amendment compensation for private property taken for public uses constitutes an essential element in "due process of law," and without such compensation the appropriation of private property to public uses, no matter under what form of procedure it is taken, would violate the provisions of the federal constitution.'

• • • • • • • • •

> In our opinion a judgment of the State Court even if it be authorized by statute whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the 14th Amendment of the Constitution of the United States, and the affirmance of such judgment by the highest court of the State is a denial by that State of a right secured to the owner by that instrument."

"Of course the drawback in that case was the question of compensation, and it was held that the State cannot, no matter what its own courts decide, take private property without compensation without violating the 14th Amendment. We feel certain that it is equally true that the State may not take the private property of one of its citizens except for a known and designated public use, and if no known use is found, or if upon its being found it is obviously private, then the rights of a citizen under the 14th Amendment have been violated. It would appear to be equally logical to say that the judgment of the highest court of the State, being but a part of the governmental machinery of that State in the expropriation of the property, is not conclusive upon this court on the questions here involved, the consideration being not limited to a determination of whether a stated particular use is public or not, but is focused upon a far more important question, determinable upon principles of general law rather than upon local conditions, and the needs, customs and dealings of the people of a particular state or locality.

The last paragraph quoted, *supra*, seems to contain the settled opinions of this court on the subject. If by authority of the statute in question the State appropriates private property even by virtue of a judgment of the State Court, without compensation made or secured to the owner, upon principle and authority the proceedings lack the "due process of law" required by the 14th Amendment to the Constitution of the United States, and when the judicial proceedings in the lower court of the State are affirmed by the highest court of the State we have a denial by the State of a right secured to the owner by the Federal Constitution.

This brings us to a consideration of several matters. Can it be said that the right to be compensated for property expropriated is any more a fundamental right than the right to insist upon private property being taken for nothing but a public use. We urge that although the right of eminent domain is an inherent attribute of sovereignty, it is circumscribed by inherent restrictions which always and in every instance must be construed just as liberally and just as closely as the right itself, among which are (a) the right to compensation, and (b) that the power of eminent domain must be exercised only for a public use—that is to say for a governmental use. We take the position that the power of eminent domain cannot be used to transfer the title of land from private to public ownership without it first clearly appearing that the transfer is demanded for a particular use and that use must be public, and that this restriction upon the exercise of the power parallels the restriction that compensation must

be paid. It is not a creature of constitution or statute but an indispensable corollary of the power of eminent domain conceived therewith, born of the same mother of necessity and united from thence hitherto by bonds of logic and reason that can never be severed.

If therefore, property is taken without due process of law irrespective of the judicial pronouncements of state courts when the taking is without compensation made or secured to the owner, we urge that it is equally appropriated without due process when it clearly appears that it is not taken for a known, specified and limited use and that this court has ample jurisdiction to review the entire proceeding including the judgment of the highest court of the State and to determine whether or no the State is seeking to take the property without first specifying the use for which it is expropriated.

Reference has been made in the case last referred to, to an earlier decision of this court in the case of *Davidson* v. *Board of Administrators of the City of New Orleans, et al.*, 96 U. S. 90, 24 L. ed. 616. In the opinion by Mr. Justice Miller, will be found some of the language used in the case of *C. B. & Q. Railroad* v. *Chicago, supra*, and in addition to that we note the following from the opinion:

> "It seems to us that a statute which declared in terms, and without more, that the full exclusive title of a described piece of land, which is now in A shall be and is hereby vested in B, would, if effectual, deprive A of his property without due

process of law, within the meaning of the constitutional provisions."

The statute under consideration here seems to fall within the boundaries of this expression. A reading of it will disclose that it does substantially that very thing. It says that the State may take title from plaintiff in error and transfer it to the State, and while it provides for proceedings calculated solely to be useful in ascertaining the amount of compensation, it does not provide for the other indispensable element of the right of eminent domain, to-wit: that the property is taken for a public or any known use.

The most that is said in either the statute or the legislative resolution is that the property shall be taken away from plaintiff in error because of a peculiar quality of the property, to-wit, that it is possessed of unusual historical interest and the whole text of the decision of the Supreme Court of Kansas is founded upon this expression. That court seeks to justify the expropriation on the theory that the property thus possessed of unusual historical interest would be valuable for the State to own and preserve. If this is true, other statutes ranging into infinity might similarly be enacted authorizing the condemnation of private property having any one of many peculiar qualities and attributes of desirability.

The right of eminent domain extends to every species of property with the possible exception of money, and if real estate may be condemned because of any peculiar quality without more, our heirlooms, family pictures, and antiques, likewise may be rescued

from our private ownership no matter what hallowed associations may surround them, simply because some State Historical Society or the State itself may conclude that it wants them. Of course, it could get them and properly so, if necessary for public or governmental purpose, but without this latter element, the proposition savors of the despotic. If there is any use specified which by any stretch of the imagination can be construed as a public one, well and good, but to say that the State may condemn private property at its own price against the will of the owner, capriciously and for no obvious, known, designated purpose or use, but solely to *rescue* it from private ownership occurs to us as being an usurpation of power against which the citizen is protected by the 14th Amendment to the Constitution of the United States.

In its opinion, (R. 64-65), the Supreme Court of Kansas said:

> "The meaning of the statute is clear enough that places invested with unusual historical interest may be acquired by the State by gift, devise or condemnation, for the use and benefit of the State as places of that character."

Condensed, the statement may be this:

> "Places invested with unusual historical interest may be condemned by the State for its use as places of unusual historical interest."

May heirlooms be condemned by the State for its use as heirlooms? The reasoning seems to run in a circle and becomes a potent argument that the State simply desires to transfer the naked title and right of posses-

sion because it wants to do it and not for any governmental use or purpose.

One other observation to show the unstable and vacillating character of the legislation involved in this controversy. In the Joint Resolution, Section 4 (R. 7), it is provided that the governor shall designate the State Historical Society the custodian thereof and in addition thereto, he shall appoint a board consisting of the secretary of that society, the state architect and one other person to be selected by the governor whose duties are specified and consist in making a survey of the property and recommending such measures as they may deem necessary and advisable for the proper preservation and restoration of the property.

The first sentence of this section doubtless impelled the court to say in the opinion (R. 65):

> "The State Historical Society is to be the custodian of the place."

Before the adjournment of that legislature it switched the management and control from the State Historical Society to the governor's board, by Section 7 of the appropriation bill (R. 10) when it said:

> "The said board created by Section 4 of said House Joint Resolution No. 1 *shall have the management and control* of said real estate after the same is restored to the possession of the State of Kansas, AND IS AUTHORIZED TO DO ALL THINGS NECESSARY TO AND CONSISTENT WITH THE USE OF THE SAME BY THE STATE, AS A PLACE OF UNUSUAL HISTORICAL INTEREST . . . ."

These acts are therefore vague and indefinite but it is not difficult to understand that the State had no fixed policy or known use, or definite purpose in connection with this property.

At first it is enacted that the governor's board shall make a survey and recommendation after the property is reduced to possession, but on second thought it is given the absolute management and control thereof with authority to do whatever it may determine to be necessary to and consistent with the use of the same by the State as a place of unusual historical interest. Instead of being able to know and visualize a definite use and purpose, we are left to learn in the future the nature and character and extent of the use as shall hereafter be fixed by the governor's board. The only limitation upon this use is that the things which are to be done to the property shall be necessary to and consistent with its use by the State as a place of historical interest—as dangerous an expression and as sure to be productive of controversy as the conventional clause "reasonable time," "reasonable diligence," and loose expressions of that character which have filled the courts with litigation.

Conclusion.

It is therefore respectfully submitted that the plaintiff in error's exceptions are well taken, and that the act and proceedings discussed do not constitute due process of law within the meaning of the 14th Amendment to the Constitution of the United States, for which reason, such acts and proceedings are invalid.

and the judgment and decision of the Supreme Court of the State of Kansas should be reversed and the cause remanded with directions to enter judgment for plaintiff in error.

J. H. Brady,
T. F. Railsback,
Counsel for Plaintiff in Error.

APPENDIX.

The Gettysburg Case.

Opinion only. For statement of facts, see brief, *ante* p. 98 (italics ours).

The opinion of the court is quoted in full as follows:

United States v. *Gettysburg Electric Railway Company*, 40 Law. Ed. p. 679, 160 U. S. 668:

> "The really important question to be determined in these proceedings is whether the use to which the petitioner desires to put the land described in the petitions is that kind of public use for which the Government of the United States is authorized to condemn land.
>
> "It has authority to do so whenever it is necessary or appropriate to use the land in the execution of any of the powers granted to it by the Constitution. *Kohl* v. *United States*, 91 U. S. 367 (23: 449); *Cherokee Nation* v. *Southern Kansas R. Co.*, 135 U. S. 641-656 (34: 265-301); *Chappell* v. *United States*, 160 U. S. 499 (*ante*, 510).
>
> "*Is the proposed use to which this land is to be put a public use* within this limitation?
>
> "*The purpose of the use is stated in the First Act of Congress*, passed on the 3d day of March, 1893 (the Appropriation Act of 1893), and is quoted in the above statement of facts. The Appropriation Act of August 18, 1894, also contained the following: '*For continuing the work of surveying, locating, and preserving the lines of*

battle at Gettysburg, Pa., and for purchasing, opening, constructing, and improving avenues along the portions occupied by the various commands of the Armies of the Potomac and Northern Virginia on that field, and for fencing the same; and for the purchase, at private sale or by condemnation, of such parcels of land as the Secretary of War (680) may deem necessary for the sites of tablets, and for the construction of the said avenues; for determining the leading tactical positions and properly marking the same with tablets of batteries, regiments, brigades, divisions, corps, and other organizations with references to the study and correct understanding of the battle, each tablet bearing a brief historical legend, compiled without praise and without censure, $50,000 to be expended under the direction of the Secretary of War.'

"In these Acts of Congress and in the joint resolution the intended use of this land is plainly set forth. It is stated in the 2d volume of Judge Dillon's work on Municipal Corporations (4th Ed.), Sec. 600, that when the legislature has declared the use or purpose to be a public one, its judgment will be respected by the courts, unless the use be palpably without reasonable foundation. Many authorities are cited in the note, and, indeed, the rule commends itself as a rational and proper one.

"As just compensation, which is the full value of the property taken, is to be paid, and the amount must be raised by taxation where the land is taken by the government itself, there is not much ground to fear any abuse of the power. The responsibility of Congress to the people will generally, if not always, result in a most conserva-

tive exercise of the right. It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case, the presumption that the *intended use* for which the corporation proposes to take the land is public is not so strong as where the government intends to use the land itself.

"In examining an Act of Congress it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent; no presumption of invalidity can be indulged in; it must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government.

"Upon the question *whether the proposed use of this land is a public one*, we think there can (681) be no well-founded doubt. And also, in our judgment, the government has the constitutional power to condemn the land *for the proposed use*. It is, of course, not necessary that the power of condemnation for *such purpose* be expressly given by the Constitution. The right to condemn at all is not so given. It results from the powers that are given, and it is implied because of its necessity, or because it is appropriate in exercising those powers. Congress has power to declare war and to create and equip armies and navies. It has the great power of taxation to be exercised for the common defense and general welfare. Having such powers, it has such other and implied ones as are necessary and appropriate for the purpose of carrying the powers expressly given into effect. Any Act of Congress which plainly and directly tends to enhance the respect

and love of the citizen for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with and appropriate to the exercise of some one or all of the powers granted by Congress must be valid. *This proposed use* comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch* v. *Maryland*, 17 U. S. 4 Wheat, 421 (4; 605), in these words: 'Let the end be legitimate, if it be within the scope of the Constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional.'

"The end to be attained by *this proposed use*, as provided for by the act of Congress, is legitimate, and lies within the scope of the Constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be over estimated. The existence of the government itself and the perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned 'from (682) an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the

various sites upon which this struggle took place? Can it not erect the *monuments provided for by these Acts of Congress*, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily, not only a public use, but one so closely connected with the welfare of the Republic itself as to be within the powers granted Congress by the Constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the service and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great Republic of modern times is forcibly impressed upon every one who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the Government of the United States, through its representatives in Congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of Congress touches the heart, and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defense in time of necessity, and it is to such men that the country must look for its safety. The institu-

tions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public * * * expense. The right to take land (683) for cemeteries for the burial of the deceased soldiers of the country rests on the same footing and is connected with and springs from the same powers of the Constitution. It seems very clear that the government has the right to bury its own soldiers and to see to it that their graves shall not remain unknown or unhonored.

"No narrow view of the *character of this proposed use* should be taken. Its national character and importance, we think, are plain. The power to condemn *for this purpose* need not be plainly and unmistakably reduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred.

"It is needless to enlarge upon the subject, and the determination is arrived at without hesitation *that the use intended as set forth in the petition* in this proceeding is of that public nature which comes within the constitutional power of Congress to provide for by the condemnation of land.

"Second. It is objected that the appropriations made by the several Acts of Congress had been exhausted when the amended answers were put in, and that the proviso attached to the joint

resolution above mentioned, prohibiting any expenditure other than such as might be appropriated in that session of Congress, renders it impossible for the land owner to obtain payment with any certainty for his property that might be taken from him. Although it is set up in the answer of the electric company to the petition filed on the part of the United States, the fact that the fund appropriated has been exhausted does not appear by any evidence contained in either record. So far as this court can see from the record, there is an appropriation amounting to $75,000, for the purpose of obtaining land, a part of which has been found to be worth $30,000 and the other, and much smaller portion, is not valued. The proviso, therefore, would seem to be immaterial, as the appropriations were much larger than the value of the land to be taken. The mere fact that Congress limited the amount to be appropriated for the purposes indicated does not * * * render the law providing for the taking of the land invalid. *Shoemaker* v. *United States*, 147 U. S. 282, 302 (37: 170-186). Mr. Justice Shiras in delivering the opinion of the court in the case cited said: "The validity of the law is further challenged because the aggregate amount to be expended in the purchase of land for the park is limited to the amount of $1,200,000." It is said that this is equivalent to condemning the lands and fixing their value by arbitrary enactment. But a glance at the act shows that the property holders are not affected by the limitation. The value of the lands is to be agreed upon, or, in the absence of agreement is to be found by appraisers to be appointed by the court. The intention expressed by Congress, not to go beyond a certain aggregate

expenditure, cannot be deemed a direction to the appraisers to keep within any given limit in valuing any particular piece of property. It is unusual for Congress, in making appropriations for the erection of public buildings, including the purchase of sites, to name a sum beyond which expenditure shall not be made, but nobody ever thought that such a limitation had anything to do with what the owners of the property should have a right to receive in case proceedings to condemn had to be resorted to.' If it appeared by proof that the appropriation for the purpose indicated that had been exhausted before the proceedings had been commenced to take the land in controversy, or during the hearing, then the provision in the joint resolution directing that no obligation or liability upon the part of the Government should be incurred, or an expenditure made, except out of the appropriations already made and to be made during the then session of Congress, would give rise to a very serious question. It is not now presented. Congress has the power, even now, to appropriate moneys for this purpose in addition to that which it appropriated in the two Acts of 1893 and 1894. This court, cannot, therefore upon the record as it stands, give judgment for the land owner on the ground that the appropriation for the land has been exhausted in other ways, and that Congress prohibited the incurring of any obligation to a greater extent than the moneys then appropriated.

"Third. Another objection taken in the court below, though * * * not decided by that court (685) but which counsel for defendant in error now urges as an additional ground for the affirmance of the judgment, is that the land pro-

posed to be taken in this proceeding was already devoted to another public use, to-wit, the railroad company, and that it does not appear that it was the intention of Congress to take land which was devoted to another public use. The defendant in error concedes what is without doubt true, that this is a question of intention simply; the power of Congress to take land devoted to one public use for another and a different public use upon making just compensation cannot be disputed. Upon looking at the two acts of Congress and the joint resolution of June 6, 1894, above referred to, in the latter of which it is stated, "'There is imminent danger that portions of said battlefield may be irreparably defaced by the construction of a railway over the same,' thereby making impracticable the execution of the provisions of the Act of March 3, 1893'—we think it is plainly apparent that Congress did intend to take this very land, occupied and used by this company for its railroad.

"Further elaboration is unnecessary. It is so plain to our minds that extended argument would be unprofitable.

"Fourth. It is also objected that the exception below is valid, wherein it was stated that all of the land of the railroad company ought to be taken, if any were to be taken. The *use for which the land is to be taken having been determined to be a public use*, the quantity which should be taken is a legislative and not a judicial question. *Shoemaker* v. *United States*, 147 U. S. 282-298 (37: 170-184). As to the effect of the taking upon the land remaining, that is more a question of the amount of the compensation. If the part taken by the government is

essential to enable the railroad corporation to perform its functions, or if the value of the remaining property is impaired, such facts might enter into the question of the amount of the compensation to be awarded. *Monongahela Nav. Co.* v. *United States*, 148 U. S. 312, 333, 334 (37: 463, 470).

"Fifth. It is also objected that the petition does not allege that the Secretary of War has decided it to be necessary to take this land. A perusal of the petition shows that the allegation (686) • • • herein contained upon this subject is not very clear. It might possibly be regarded as sufficiently alleged in an argumentative kind of way, but it certainly is not as plainly alleged as it ought to be. The petition, however, can be easily amended on application to the court below before further proceedings are taken.

"This, we think, completes the review of the material questions presented by the record. The first and important question in regard to whether *the proposed use* is public or not having been determined in favor of the United States, we are not disposed to take any very technical view of the other questions which might be subject to amendment or to further proof upon the hearing below. The judgment of the circuit court in each case must be reversed, and the record remitted to that court, with directions to grant a new trial in each."

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No. 63.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

KATHERINE C. ROE, PLAINTIFF IN ERROR,

VS.

THE STATE OF KANSAS ON THE RELATION OF WILLIAM A. SMITH, ATTORNEY GENERAL; LINCOLN AND LEE UNIVERSITY OF KANSAS CITY, ET AL., DEFENDANTS IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

REPLY BRIEF OF PLAINTIFF IN ERROR.

Defendant in error, the State of Kansas, has raised the point in its brief that the Supreme Court of the State of Kansas in its decision, construed the statute in question to the extent that it is held to specify the use or purpose, and urges that said statute must be treated by this court, as so construed, to specify a use

or purpose, with the result that the consideration of this case must begin at that point, and that this court is without jurisdiction to consider the statute as enacted, its effect and consequence.

Plaintiff in error recognizing the rule that the construction by the highest court of a state of its own statute is controlling upon this court, except in certain instances, respectfully urges this to be an instance within the list of exceptions.

We believe the question raised as to the constitutionality of the statute is not divisible, and that the most that can be said of the construction thereof by the Supreme Court of Kansas is "that said statute provides for the condemnation of private property *for a public use*," and that said entire question of public use can be reviewed by this court, analyzing the statute independently of the opinion of the Supreme Court of Kansas.

We believe this case is set apart from the ordinary run of cases where the rule contended for by the state is applicable, under the reasoning and authority of *Chicago, Burlington & Quincy Railroad Company v. Chicago*, 166 U. S. 226, 41 L. ed. 979, in which it was held that the judgment of the state court is merely a part of the machinery of the state made use of to acquire property by eminent domain and stands or falls with the other action of the state and is subject to be reviewed when it is charged that such acquisition of private property by the state violates the prohibitions of the 14th Amendment to the Federal Constitution.

This is a condemnation by the state, and the high-

est court of the state is equally bond by that amendment with the legislature. In the ordinary application of the rule contended for, the construction of a statute by the highest court of a state becomes a part of the statute, and in practical effect is amalgamated with the legislation. It sometimes happens as to appear, at least, to be additional (called judicial) legislation. In considering the rights of a citizen said to be impinged by the legislation of a state, the entire program beginning with the legislative act and ending with the decision of the highest court of the state, constitutes the action of the state, and its entirety should be considered by this court to see if the state as a unit, through any or all of its agencies, has violated the prohibitions of the Federal Constitution.

In the case last referred to, this court said, quoting from the case of *Davidson* v. *New Orleans*:

> "Can a state make anything due process of law which, by its own legislation, it chooses to declare such?
>
> To affirm this is to hold that the prohibition to the states is of no avail, or has no application where the invasion of private rights is effected under the forms of state legislation."

Plaintiff in error takes the position that the provisions of the Federal Constitution, protecting the rights and property of persons, extend *to all acts of the state whether through its legislative, its executive, or its judicial authority.* The restraints of

the 14th Amendment bind equally judges and legislatures. Neither can act in disregard of fundamental laws.

Scott v. *McNeal*, 154 U. S. 34.
C. B. & Q. R. R. Co. v. *Chicago*, 166 U. S. 226.
Twining v. *New Jersey*, 211 U. S. 78.
Davidson v. *New Orleans*, 96 U. S. 97.

In *Scott* v. *Mc Neal*, 154 U. S., 34; 38 L. ed. 896, it is held that the doctrine of the cases holding that it is for the state courts alone to construe their own laws, does not require the Supreme Court of the United States on writ of error to a state court to accept that court's construction of a state statute or a statute enacted by a territory before its admission into the union as a state, when the question is whether such statute provides for the notice required to constitute due process of law.

We quote from that case as follows:

> "The grounds of the judgment of the Supreme Court of the State of Washington in the case at bar, as stated in its opinion, were that the equities of the case appeared to be with the defendants; that the court was inclined to follow the case of *Roderigas* v. *East River Sav. Inst.*, 63 N. Y. 460, 20 Am. Rep. 555, and that, under the laws of the territory, the probate court, on an application for letters of administration, had authority to find the fact as to the death of the intestate; the court saying: 'Our statutes only authorize administration of the estate of deceased persons, and before granting letters of administration the court must be satisfied by proof of the death of the intestate. The proceeding is substantially *in rem*, and all parties must be held to have received notice of the institution and pendency of such proceedings,

where notice is given as required by law. Section 1299 of the 1881 Code gave the probate court exclusive original jurisdiction in such matters, and authorized such court to summon parties and witnesses, and examination was made of them touching any matter in controversy before said court or in the exercise of its jurisdiction.' Such were the grounds upon which it was held that the plaintiff had not been deprived of his property without due process of law, 5 Wash. 309, 317, 318.

After giving to the opinion of the supreme court of the state the respectful consideration to which it is entitled, we are unable to concur in its conclusion, or in the reasons on which it is founded.

The 14th Article of Amendment of the Constitution of the United States, after other provisions which do not touch this case, ordains 'nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Ex parte Virginia* (*Virginia* v. *Rives*') 100 U. S. 313, 318, 319 (25: 667, 669) *Ex parte Virginia*, 100 U. S. 339, 346 (25: 676, 679); *Neal* v. *Delaware*, 103 U. S. 370, 397 (26: 567, 574). And the first one, as said by Chief Justice Waite in *United States* v. *Cruikshank*, 92 U. S. 542, 554 (23: 588, 592), repeating the words of Mr. Justice Johnson in *Bank of Columbia* v. *Okely*, 17 U. S. 4 Wheat. 235, 244 (4: 559, 561); was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'

Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a

statute of the territory, or of the state, *when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether* the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute. *Huntington* v. *Attrill*, 146 U. S. 657, 683, 684 (36: 1123, 1133); *Mobile & O. R. Co.* v. *Tennessee*, *ante*, p. 793.

No judgment of a court is due process of law, if rendered without jurisdiction in the court, or without notice of the party.

The words 'due process of law,' when applied to judicial proceedings, as was said by Mr. Justice Field, speaking for this court, 'mean a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights.' "

The Supreme Court of Washington in that case construed its own statute, but this court adopted an independent and contrary construction of it, holding that that statute did not contain or provide for the requisite notice to constitute due process. The Supreme Court of Washington held to the contrary and that the statute did provide for notice. The case apparently is analogous to the case at bar, and authorizes this court to consider the statute involved here as to which the highest state court of Kansas has said:

"It specifies a use."

This court upon consideration of it may treat the statute as it did in the Washington case and say:

"It does not specify a use."

In this case (as in that) it is our contention that no judgment of the courts of Kansas in this proceeding is due process of law unless there is jurisdiction in the court, and that jurisdiction is wanting if the act in question violates the fundamental rights of a citizen, or the rights guaranteed under the Constitution of the United States.

We have urged that a definite and specific use, which must be a public use, must clearly appear before there is jurisdiction to condemn private property. The necessity of a use, and *a fortiori* a public use, to which condemned property must be put, is a rule and principle which has been established in our system of jurisprudence for the protection and enforcement of private rights, and, therefore, to ascertain if there was in fact due process of law under the 14th Amendment, the entire act must be construed by this court to bring it within the apt definition of due process of law referred to in the last sentence quoted, *supra*, where Mr. Justice Field, speaking for this court, in the case of *Pennoyer v. Neff*, 95 U. S. 714, said:

> "Due process of law means a course of legal proceedings according to those rules and principles which have been established in our systems of jurisprudence for the protection and enforcement of private rights."

Referring again to the opinion in *Scott v. McNeal*, 154 U. S., 34, *supra*, for purpose of comparison, we

quote what seems to be the controlling language in the opinion on this subject:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, *when the question is whether the statute provided for the notice required to constitute due process of law*, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute."

Is not this equally appropriate in an eminent domain case if paraphrased as follows:

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, *when the question is whether the statute provided for COMPENSATION required to constitute due process of law*, than when the question is etc. etc."

And if it might fit an eminent domain case, where the fatal defect was failure to provide essential compensation, might it likewise not be a perfect fit for the case at bar, when read as follows?

> "Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed

> under the Constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, *when the question is whether the statute SPECIFIED A PUBLIC USE required to constitute due process of law*, than when the question is, etc. etc."

In the Scott case notice was jurisdictional, and we believe that the payment of compensation would be essential to the jurisdiction to condemn private property, and following the thought in our brief, the specification of a use which must be public is equally fundamental and jurisdictional. If our thought is correct, this court may then proceed to inquire into the statute unhampered by any decision of the state court, when the question is one to determine whether jurisdiction to condemn is given—when the question is whether the statute provided either compensation or specified a public use. Obviously the specification of no use cannot be said to be the designation of any public use.

In the case of *Mugler* v. *Kansas*, 123 U. S., 562, 31 L. ed. 205, the constitutionality of the Kansas prohibition law was passed upon by this court, and in the course of the opinion by Mr. Justice Harlan it was observed as follows:

> "It does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exertion of the police powers of the state. There are, of necessity, limits beyond which legislation cannot rightfully go. While every possible presumption is to be indulged in favor of the validity of a statute, Sinking Fund Cases, 99 U. S. 718 (25:501), the courts must obey the constitution rather than the law-making department of government, and must, upon their own re-

sponsibility, determine whether, in any particular case, these limits have been passed.

'To what purpose,' it was said in *Marbury v. Madison*, 5 U. S. 1 Cranch, 137, 167 (2:60, 70), 'are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed and if acts prohibited and acts allowed are of equal obligation.' The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution."

There is at least one class of cases in which this court has elected never to be bound by the construction placed upon statutes of the highest court of the state, namely, those cases where such statutes must be construed in passing upon the issue of impairment of the obligation of contracts. The rule is succinctly stated in *McCullough v. Virginia*, 172 U. S., 102, 43 L. ed. 382, l. c. 384.

"It is insisted that whatever may be our own opinions upon the case, we are to take the construction placed by the court of appeals of Virginia upon the act as the law of that state. While it is undoubtedly the general rule of this court to

accept the construction placed by the courts of a state upon its statutes and constitution, yet one exception to this rule has always been recognized, and that in reference to the matter of contracts alleged to have been impaired. This was distinctly affirmed in *Jefferson Branch Bank* v. *Skelly*, 1 Black, 436, 443 (17:173, 177), in which the court, speaking by Mr. Justice Wayne, gave these reasons for the exception: 'It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the Constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation, if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced, notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should, or could with fidelity to the Constitution of the United States, follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion.' The doctrine thus announced has been uniformly followed. *Bridge Proprietors* v. *Hoboken Land & Improv. Co.*, 1 Wall. 116, 145 (17:571, 576); *Wright* v. *Nagle*, 101 U. S. 791, 793 (25: 921, 922); *McGahey* v. *Virginia*, 135 U. S. 665, 667 (34:305, 306); in which, in reference to this very contract, it was said: 'In ordinary cases the decision of the

highest court of a state with regard to the validity of one of its statutes would be binding upon this court; but where the question raised is, whether a contract has or has not been made, the obligation of which is alleged to have been impaired by legislative action, it is the prerogative of this court under the constitution of the United States and the acts of Congress relating to writs of error to the judgments of state courts, to inquire and judge for itself with regard to the making of such contract, whatever may be the views or decisions of the state courts in relation thereto.' See also *Douglas* v. *Kentucky*, 168 U. S. 488, 501 (42: 553, 557), and cases cited therein."

While the right of review in the instant case is not predicated upon the issue of impairment of contract, the necessity for an independent examination and construction of the statute seems to be analogous.

Plaintiff in error takes the position that this is not an ordinary case of statutory construction, one in which the highest court of a state has decided that one of two possible views must prevail, or one in which it has harmonized the statute with other legislation, but it is a case wherein (if it can be correctly said, as contended for by defendant in error, that the statute has been construed) the alleged construction falls within the class of exceptions where this court has exercised its prerogative to study, consider and for itself construe the entire act in reference to the facts of the case.

It is a case, in our humble opinion, where all of the questions presented in the plaintiff in error's brief are so interwoven with the Federal question as to require determination in order intelligently to decide that question.

We contend that notwithstanding the rarity of its construction by this court, the question of whether or not private property is expropriated for public use is essentially and fundamentally in every instance a Federal question, when properly raised by the pleadings, and, in this case, that question is clearly before the court.

We contend that the highest court of Kansas, when it said that a use is specified under the statute, has not placed a construction upon the statute which is controlling in this court because the question of a public use is not thus divisible.

We quote the following from the case of *William Truax, et al* v. *Michael Corrigan, et al.*, 257 U. S. 312, 66 L. ed. 254, 42 Sup. Ct. Rep. 124. This case came before this court on petition in error to the Supreme Court of Arizona to review its ruling on a state statute in the nature of an anti strike statute. In the opinion by Mr. Chief Justice Taft it is said:

> "The plaintiffs alleged that this paragraph (of the statute of Arizona) if it made unlawful defendants' acts, contravened the 14th Amendment to the Constitution of the United States by depriving plaintiffs of their property without due process of law, and by denying to plaintiffs the equal protection of the laws, and was, therefore, void and of no effect. Upon the case thus stated the plaintiffs asked a temporary and a permanent injunction.
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> • • • • • • •
>
> The Superior Court for Cochise County sustained the demurrer and dismissed the complaint, and this judgment was affirmed by the Supreme Court of Arizona.

The facts alleged are admitted by the demurrer, and, in determining their legal effect as a deprivation of plaintiff's legal rights under the 14th Amendment, we are at as full liberty to consider them as was the state supreme court. *Mackay v. Dillon*, 4 How. 431, 11 L. ed. 1046; *Dower v. Richards*, 151 U. S. 658, 667, 38 L. ed. 305, 308, 14 Sup. Ct. Rep. 452, 17 Mor. Min. Rep. 704. Nor does the court's declaration that the statute is a rule of evidence bind us in such an investigation. *Bailey v. Alabama*, 219 U. S. 219, 238, 239, 55 L. ed. 191, 200, 31 Sup. Ct. Rep. 145; *Chicago, M. & St. P. R. Co. v. Minnesota*, 134 U. S. 418, 33 L. ed. 970, 3 Inters. Com. Rep. 209, 10 Sup. Ct. Rep. 462, 702; *Mugler v. Kansas*, 123 U. S. 623, 661, 31 L. ed. 205, 210, 8 Sup. Ct. Rep. 273; *Corn Products Ref. Co. v. Eddy*, 249 U. S. 427, 432, 3 L. ed. 689, 693, 39 Sup. Ct. Rep. 325. In cases brought to this court from state courts for review, on the ground that a Federal right set up in the state court has been wrongly denied, and in which the state court has put its decision on a finding that the asserted Federal right has no basis in point of fact, or has been waived or lost, this court, as an incident of its power to determine whether a Federal right has been wrongly denied, may go behind the finding to see whether it is without substantial support. If the rule were otherwise, it almost always would be within the power of a state court practically to prevent a review here. *Kansas City Southern R. Co. v. H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. ed. 556, 565, 32 Sup. Ct. Rep. 316; *Cedar Rapids Gaslight Co. v. Cedar Rapids*, 223 U. S. 655, 668, 669, 56 L. ed. 594, 604, 32 Sup. Ct. Rep. 389; *Southern P. Co. v. Schuyler*, 227 U. S. 601, 611, 57 L. ed. 662, 669, 43 L. R. A. (N. S.) 901, 33 Sup. Ct. Rep. 277. Another class of cases in which this court will review the finding of the court as to the facts is when the conclusion of law and findings of fact are so intermingled as to make it necessary, in order to pass upon the question, to

analyze the facts. *Northern P. R. Co.* v. *North Dakota*, 236 U. S. 585, 593, 59 L. ed. 735, 740, L. R. A. 1917 F, 1148, P. U. R. 1915 C, 277, 35 Sup. Ct. Rep. 429, Ann. Cas. 1916 A, 1; *Jones Nat. Bank* v. *Yates*, 240 U. S. 541, 552, 553, 60 L. ed. 788, 797, 798, 36 Sup. Ct. Rep. 429. In view of these decisions and the grounds upon which they proceed, it is clear that in a case like the present, where the issue is whether a state statute, in its application to facts which are set out in detail in the pleadings and are admitted by demurrer, violates the Federal Constitution, this court must analyze the facts as averred and draw its own inferences as to their ultimate effect, and is not bound by the conclusion of the state supreme court in this regard. The only respect in such a case in which this court is bound by the judgment of the state supreme court is in the construction which that court puts upon the statute."

The case of *Standard Oil Company* v. *Graves*, 249 U. S., 389, 63 L. ed. 662, was to review the decision of the highest court of the State of Washington upon a statute imposing an inspection on oil companies. The highest court of that state called the fee an occupation tax or excise tax instead of a property tax, and in discussing the matter this court said:

"It is contended by the plaintiff in error that this inspection law violates the commerce clause, Art. 1, Chapter 8, of the Constitution of the United States, in that it directly burdens such commerce by imposing inspection taxes far in excess of the cost of inspection. The supreme court of the state held that the tax was not upon property, but could be sustained as an excise or occupation tax upon the business of selling oil within the state. The reason given by the court for holding that the tax could not be upheld as a property tax rested upon provisions of the state constitution.

> While this court follows the decisions of the highest court of a state, as to the meaning of statutes in cases of this character, the name given to the statute is not conclusive. It must be judged by its necessary effect, and if that is to violate the Constitution of the United States, the law must be declared void. *Minnesota* v. *Barber*, 136 U. S. 313, 319, 35 L. ed. 455, 3 Inters. Com. Rep. 185, 10 Sup. Ct. Rep. 862; *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38, Sup. Ct. Rep. 126, and cases cited.
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> * * * * * * *
>
> We reach the conclusion that the statute imposing these excessive inspection fees, in the manner stated, upon all sales of oils brought into the state in interstate (397) commerce, necessarily imposes a direct burden upon such commerce, and is therefore violative of the commerce clause of the Federal Constitution. * * *
>
> It follows that the judgment of the Supreme Court of Washington must be reversed."

In the case of *Crew Levick Co.* v. *Pennsylvania*, 245 U. S. 291, 62 L. ed. 295, in discussing the effect of the decision of the highest court of a state, this court said:

> "As in other cases of this character, we accept the decision of the state court of last resort respecting the proper construction of the statute, but are in duty bound to determine the questions raised under the Federal Constitution upon our own judgment of the actual operation and effect of the tax, irrespective of the form it bears or how it is characterized by the state courts. *Galveston H. & S. A. R. Co.* v. *Texas*, 210 U. S. 217, 227, 52 L. ed. 1031, 1037, 28 Sup. Ct. Rep. 638; *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, 362, 59 L. Ed. 265, 271, 35 Sup. Ct. Rep. 99; *Kansas City, S. & M. R. Co.* v. *Botkin*, 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261."

In the case of *Corn Products Refining Company* v. *Eddy*, 249 U. S., 427, 63 L. ed. 689, we find the following expression in the head notes:

> "3. In reviewing the judgment of a state court in a case in which it was unsuccessfully contended that a state law deprived a party of rights secured by the Federal Constitution, the Federal Supreme Court is concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state."

In the opinion, l. c. 432, the subject was discussed in the following language:

> "Although the supreme court in its opinion said nothing about interstate commerce, it cannot be doubted in the state of the record, that defendants' activities against which relief was sought included incidental interference with plaintiff's interstate commerce in the 'Mary Jane' syrup; and that the general judgment in favor of defendants amounts to an adjudication that the state law and regulations are to be enforced with respect to plaintiff's product indiscriminately, not only when sold and offered for sale in domestic commerce, but also while in the hands of the importing dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state. The silence of the supreme court upon the subject cannot change the result in this regard. In cases of this kind, we are concerned not with the characterization or construction of the state law by the state court, nor even with the question whether it has in terms been construed, but solely with the effect and operation of the law as put in force by the state. *St. Louis Southwestern R. Co.* v. *Arkansas*, 235 U. S. 350, 362, 59

L. ed. 265 271, 35 Sup. Ct. Rep. 99; *Kansas City Ft. S. & M. R. Co. v. Botkin*, 240 U. S. 227, 231, 60 L. ed. 617, 618, 36 Sup. Ct. Rep. 261; *Mountain Timber Co. v. Washington*, 243 U. S. 219, 237, 61 L. ed. 685, 696, 27 Sup. Ct. Rep. 260, 13 N. C. C. A. 927; *Crew Levick Co. v. Pennsylvania*, 245 U. S. 292, 294, 62 L. ed. 295, 297, 38 Sup. Ct. Rep. 126."

This was a proceeding in error to the Supreme Court of the State of Kansas, and it was contended in this court by plaintiff in error that the Kansas Statute and the regulations adopted by the state board pursuant to it, *as interpreted and applied* by the state court of last resort are repugnant to several provisions of the Federal Constitution.

It respectfully is submitted, under the authorities above cited, that the state's position under the first point of its argument that this court may not examined into this statute, but must be bound by the decision of the Supreme Court of Kansas that the act in question specifies a use, is untenable and that the entire question as raised by plaintiff in error is open to review in this court with ample jurisdiction to examine the statute and construe it independently of the judgment of the Supreme Court of Kansas to see whether the statute provides a use, and, of course, a public use, which is required to constitute due process of law.

J. H. Brady,

T. F. Ransbach,

Counsel for Plaintiff in Error.

OCT 26 1928
CHARLES ELMORE CROPLEY
CLERK

No. 63.

In the Supreme Court of the United States.

October Term, 1928.

KATHERINE C. ROE, *Plaintiff in Error*,
vs.
THE STATE OF KANSAS, on the relation of WILLIAM A. SMITH, Attorney-general; LINCOLN AND LEE UNIVERSITY OF KANSAS CITY, et al., *Defendants in Error*.

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR, THE STATE OF KANSAS.

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No. 63.

In Error to the Supreme Court of the State of Kansas.

BRIEF OF DEFENDANT IN ERROR, THE STATE OF KANSAS.

I.

The Opinion of the Court Below.

The opinion of the supreme court of Kansas is found on page 62 of the printed record. It is reported under the title of *The State of Kansas, ex rel. William A. Smith, Attorney-general, Appellee, v. John W. Kemp et al., Defendants; Paul Schleicher and Mary Schleicher, his Wife, and Katherine C. Roe, Appellants; Lincoln and Lee University, of Kansas City, Appellee*, in 124 Kan. 716, 261 Pac. 556.

II.

Jurisdiction.

Defendant in error submits that plaintiff in error has no grounds for invoking the jurisdiction of this court, upon the question argued in her brief, either under the fourteenth amendment to the constitution of the United States, or otherwise.

This is a proceeding in condemnation by the state of Kansas, under its sovereign power and by appropriate acts of its legislature, of certain real estate within its boundaries, in Johnson county, Kansas. Full provision was made in the statute for notice and hearing to the landowners who were affected thereby, and for the assessment and payment of full compensation and any damages sustained by them, with right of appeal to the highest court of the state. Such hearing was held, and plaintiff in error was given full opportunity to produce evidence and be heard at all stages of the case. She has not incorporated the evidence in the record before this court or before the highest court of the state, leaving the conclusive presumption that the evidence sustains the judgment upon all issues of fact, including the award of compensation and damages.

Plaintiff in error argues the case upon the single proposition that the statutes do not state the use for which the land is condemned. In the brief of plaintiff in error it is said (p. 35):

> "We are not confronted with the conventional question of public vs. private use, but we are confronted with the question *where no use is disclosed*, and which therefore makes impossible an analysis of the use to determine whether it is in truth and fact a public one."

The highest court of the state has construed and interpreted the statutes in question against the contention of plaintiff in error that no use was specified, and that court has held that a use was speci-

fied, to wit, the preservation and restoration of the property and its maintenance by the state as a place of unusual historical interest, or memorial of the early history of Kansas. (R. 64-65.)

This ruling is decisive of what plaintiff in error submits as the only question in the case, under the familiar rule that decisions of the highest court of the state upon the construction of its own constitution or statutes are conclusive upon this court.

Tullis v. Lake Erie & W. Railroad, 175 U. S. 348, l. c. 353.

W. Cargill Co. v. Minnesota, 180 U. S. 452.

Howe Machine Co. v. Gage, 100 U. S. 676.

Missouri Pacific Railroad Company v. State of Nebraska, 164 U. S. 403.

Backus v. Fort Street Union Depot Co., 169 U. S. 557.

Union Lime Co. v. Chicago & N. W. Ry. Co., 233 U. S. 211, l. c. 220.

Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527.

These authorities are more fully discussed at a later point in this brief, but are cited here in support of our contention at the outset of this case, that the entire proceedings in error are grounded upon a construction of the statute different from that of the highest court of the state.

The cases cited upon page 5 of the brief of plaintiff in error merely hold that this court will review, under the fourteenth amendment, a determination of the legislature or a lower court that a certain use is public. None of these cases hold that this court will review the construction of a state statute by the highest court of the state, as to what use is specified; or place a different construction upon the statute in order to render it unconstitutional.

III.

Statement of the Case.

This proceeding arose as an action in the district court of Johnson county, Kansas, wherein the state of Kansas was plaintiff, and various landowners, including Katherine C. Roe, and the Lincoln and Lee University of Kansas City, were defendants. It is an action to condemn, by judicial process, about twelve acres of land and the improvements thereon, constituting all the buildings now standing of the Old Shawnee Mission, the first landmark in the pioneer history of Kansas. The proceeding was taken under three separate statutes: Chapter 26, article III, Revised Statutes of 1923; chapter 205, Laws of Kansas, 1927; and chapter 7, Laws of Kansas, 1927. (R. 5-10.) These statutes are supplemental to each other, and taken together form the basis of this proceeding.

The first statute (chap. 26, art. III, R. S. 1923) was enacted in 1921, and constitutes an enabling act. (R. 5, 6.) It declares that lands possessed of unusual historical interest are subject to condemnation by the state and provides a procedure for their acquisition. Briefly stated, this procedure includes (1) the passage of a joint resolution by the legislature, designating the particular lands to be condemned; (2) a proceeding in the district court of the county where the lands are situated, by the attorney-general, for the purpose of effecting the condemnation and a determination of all questions of compensation and damages; and (3) the appropriation of money from the state treasury to pay for the lands taken and any damages sustained. This statute is a general law, describes no particular land, and is not self-executing—but requires both a joint resolution and appropriation act to complete the condemnation of any particular land.

Chapter 205, Laws of Kansas, 1927 (otherwise referred to as House joint resolution No. 1), is a joint resolution passed by the legislature in 1927. (R. 6-8.) It describes the lands in controversy and declares them possessed of unusual historical interest; describes briefly their historical significance, provides that they be condemned by the state, and contains the following provision for their use:

> "That upon the taking over of said property by the state, the governor shall designate the State Historical Society the custodian thereof, and he shall direct the secretary of the State Historical Society, the state architect, and one other person designated by the governor, to make a survey of said property and recommend such measures as they may deem necessary and advisable for the proper preservation and restoration of said property." (R. 7, 8.)

Chapter 7, Laws of 1927 (otherwise referred to as House bill No. 642) is a statute making appropriation for the payment of compensation and damages to the owners of the property in question and making further provision for its acquisition and use. (R. 8-10.) Sufficient funds were appropriated to compensate the owners, and an additional apropriation made for the restoration and maintenance of the property during the next biennium. This statute contains the further provision:

> "The said board created by section 4 of said House joint resolution No. 1 shall have the management and control of said real estate after the same is reduced to the possession of the state of Kansas, and is authorized to do all things necessary to and consistent with the use of the same by the state, as a place of unusual historical interest. The said board, in its discretion and with the approval of the governor, may cooperate with patriotic societies in the use thereof, not inconsistent with the purpose of the state, and to that end may accept gifts of money, property or services from such organizations and apply the same to the use and benefit of the state in the preservation and improvement and furnishing of said real estate and buildings."

The statute also provides that the board in its discretion may permit any outstanding lease to remain in effect for the remainder of

its term or a part thereof, and use the proceeds for maintenance and restoration of the property. (R. 10.)

A great variety of proceedings were had in this action, most of which are not necessary to a consideration of these proceedings in error. It is sufficient to say that by petition duly filed the real estate and its owners were described and condemnation prayed for. (R. 10-13.) The property was appraised (R. 16), and all persons having an interest in the property were made parties to the action, and were summoned and appeared in court. (R. 33.) Various defenses were raised (R. 17-25), including a claim that constitutional rights were invaded. These were given full consideration by the court and denied. (R. 35-37.) Trial was then had upon the questions of compensation and damages, and a large amount of evidence was produced on these questions by all parties. (R. 37-40.) This evidence is not preserved in the present record. (R. 44.) Compensation and damages were fixed according to the evidence, and the cause was appealed to the supreme court of Kansas, the highest court of the state. (R. 60, 61.) In that court the judgment was affirmed by a unanimous court (one justice not sitting). (R. 62-70.)

Upon the main question urged before the supreme court of Kansas, the court interpreted and construed the statutes in controversy, and held, against the contentions of the appellant, that the statutes in question did specify the use for which the property was taken by the state, to wit: the restoration and preservation thereof as a historical site or memorial; and that such use is a public use. (R. 62, 65, 70.)

The facts underlying the statutes and court proceedings are obscured to some extent by the failure of plaintiff in error to bring the evidence before this court or the supreme court of Kansas. The historical significance of the Old Shawnee Mission in Kansas history appears in the record as a part of the resolution (R. 7), and in the

opinion of the supreme court of Kansas (R. 66, 67), and was also the subject of considerable evidence.

The present condition of the property and the danger of its ultimate destruction in private hands are referred to in the findings of fact (R. 45, 46 and 47), and in the opinion of the supreme court of Kansas (R. 65, 67, 68), only in a general way, although the evidence on that point was very complete.

At the outset of these proceedings the land consisted of one rectangular piece, divided for convenience by the trial court into four tracts, because of separate ownerships. (R. 13, 14.) At this time two of these tracts have been reduced to the possession of the state, and this proceeding in error deals only with the two remaining tracts in which Katherine C. Roe claims an interest, designated as tract No. 3 and tract No. 4. (R. 72-75.)

There is no question about her ownership of tract No. 4 prior to the condemnation. Tract No. 3 is owned by the Lincoln and Lee University of Kansas City under a deed from plaintiff in error in the nature of a gift to that institution for educational purposes, with a reversion to the Haskell Institute for Indians in case the conditions of the deed were not complied with. (R. 24, 25, 27, 30.) This conveyance was made immediately prior to the condemnation by the state, and the university has had no opportunity to comply with the conditions. (R. 30, 44-47.) Because of these circumstances Katherine C. Roe claims in this case to still have some interest in tract No. 3, and to be entitled to the proceeds thereof. (R. 55, 56.) This contention was rejected by the supreme court of Kansas (R. 70), and no error is assigned as to this holding. (See R. 75-77.) Nevertheless plaintiff in error still claims a right to defeat the condemnation proceedings as to tract No. 3 in which she has no interest, as well as to tract No. 4. The Haskell Institute was not a party to these proceedings, and no claim is made on its behalf, neither is any attempt made to foreclose any rights it might have.

IV.
ARGUMENT.

SUMMARY OF ARGUMENT.

1. The Construction of a State Statute by the Highest Court of the State is Binding on this Court.

   Tullis v. Lake Erie & Western R. R. Co., 175 U. S. 348.
   Howe Machine Company v. Gage, 100 U. S. 676.
   W. Cargill Co. v. Minnesota, 180 U. S. 452.
   Missouri Pacific Ry. Co. v. State of Nebraska, 164 U. S. 403, 414.

   (a) This rule applies to the interpretation of condemnation statutes specifying the use for which the property is taken; and the decision of the supreme court of Kansas, that a definite use is specified by the statutes, is conclusive upon that point.

   Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, 530.
   Backus v. Fort Street Union Depot Co., 169 U. S. 557, 566.
   Union Lime Company v. Chicago & N. W. Ry. Co., 233 U. S. 211, 221.

   (b) This case must therefore be considered by this court with relation to the use specified in the statute as construed by the highest court in the state, to wit, the preservation and restoration of the property as a place of historical interest, and a memorial of the early history of Kansas.

2. The Use Specified is a Public Use.

   (a) To constitute a public use, it is no longer necessary that the state use the property in any active function of government.

   Shoemaker v. United States, 147 U. S. 282, 297.
   Nichols on Eminent Domain (2d ed.), vol. I, pp. 163, 164.

   (b) The determination of the highest court of a state that a use specified by the legislature is a public use, is entitled to great respect, and is ordinarily followed.

   Hairston v. Danville & Western R. R., 208 U. S. 598, 607.

Fallbrook Irrigation District v. Bradley, 164 U. S. 112.
Clark v. Nash, 198 U. S. 361.
Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527.
United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 680.
Nichols on Eminent Domain (2d ed.), vol. I, page 143.

(c) The decision of the state courts that the property is taken for a public use is correct.

United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, 681, 682, 683.

3. Where the Use is Public, the Necessity for the Taking of Any Particular Property and the Quantity Taken are Questions for the Legislature.

Shoemaker v. United States, 147 U. S. 282, 298.
Bragg v. Weaver, 251 U. S. 57, 58.

4. Plaintiff is Not Deprived of Her Property Without Due Process of Law by Reason of Any Uncertainty as to the Use to Which the Property Would be Put.

5. The Statutes Are Not Rendered Invalid by the Leasing Provisions.

United States v. Chandler-Dunbar Co., 229 U. S. 53, 72-74.

6. Plaintiff in Error Has No Interest in the Lands of Lincoln and Lee University and Cannot Defeat Their Condemnation.

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1. The Construction of a State Statute by the Highest Court of the State is Binding on this Court.

This familiar rule of law needs no extensive argument. Where the case originates in the federal courts it often becomes the duty of this court to construe a state statute in the first instance, but where the statute has been passed upon by the highest court of the state, that construction must prevail. In such cases where constitutional issues are involved, the question to be determined is whether the statute as construed by the highest court of the state violates the provisions of the federal constitution. Particularly is it true that

this court will not substitute, in place of the interpretation of the state court, a construction of a statute which would render it unconstitutional.

In *Tullis v. Lake Erie & Western Railroad Company*, 175 U. S. 348, Mr. Chief Justice Fuller, speaking for this court, said:

> "By reason of the particular phraseology of the act under consideration it is earnestly contended that the decisions sustaining the validity of the statutes of Kansas, Iowa and Ohio are not in point, and that this statute of Indiana classified railroad companies arbitrarily by name and not with regard to the nature of the business in which they were engaged, but the supreme court of the state in the case cited has held otherwise as to the proper interpretation of the act, and has treated it as practically the same as the statutes of the states referred to. Indeed the Iowa statute is quoted from, and the case of Beckwith, as well as that of Mackey, relied on as decisive in the premises.
>
> "As remarked in *Missouri, Kansas & Texas Railway v. McCann*, 174 U. S. 580, 586, the contention calls on this court to disregard the interpretation given to a state statute by the court of last resort of the state, and, by an adverse construction, to decide that the state law is repugnant to the constitution of the United States. 'But the elementary rule is that this court accepts the interpretation of a statute of a state affixed to it by the court of last resort thereof.'"

See, also—

Howe Machine Company v. Gage, 100 U. S. 676.

W. Cargill Co. v. Minnesota, 180 U. S. 452.

Missouri Pacific Ry. Co. v. State of Nebraska, 164 U. S. 403, l. c. 414.

(a) This Rule Applies to the Interpretation of Condemnation Statutes Specifying the Use for Which the Property is Taken; and the Decision of the Supreme Court of Kansas that a Definite Use is Specified by the Statutes is Conclusive Upon that Point.

In condemnation cases, as in other actions, questions occasionally arise as to the interpretation of the statutes under which the pro-

ceedings are had. In these cases, as in other cases of statutory construction, the interpretation given the statute by the highest court of the state is controlling. For example in *Strickley v. Highland Boy Gold Mining Co.*, 200 U. S. 527, l. c. 530, Mr. Justice Holmes, speaking for this court, said:

> "In view of the decision of the state court we assume that the condemnation was authorized by the state laws, subject only to the question whether those laws as construed are consistent with the fourteenth amendment. Some objections to this view were mentioned, but they are not open. If the statutes are constitutional as construed, we follow the construction of the state court."

The same view upon other statutory questions is expressed by this court in another condemnation case, *Backus v. Fort Street Union Depot Co.*, 169 U. S. 557, the court saying (l. c. 566):

> "It is not questioned by counsel that the settled rule of this court in cases of this kind is to accept the construction placed by the supreme court of the state upon its own constitution and statutes as correct."

In *Union Lime Company v. Chicago & N. W. Ry. Co.*, 233 U. S. 211, this court dealt with the precise question in this case. Land was condemned for a spur track serving a private industry, and it was contended that this was not a public use for which land might be condemned. The highest court of the state, construing the statute, held that such a spur track was subject to use as an extension of the general transportation system and subject to control by the public authorities, and that the land was accordingly taken for a public use. In this court the condemnation was upheld under this construction of the statute, as against the contention of plaintiff in error that the statute itself was not subject to such construction. After reciting the previous construction of the statute by the state court, Mr. Justice Hughes, speaking for this court, said:

> "Assailing this ruling, the plaintiff in error insists that the statute itself (referring to sections 1797-11*m* and 1797-12*n*)

> authorizes the taking of property for private use, and that, being unconstitutional on its face, it cannot form the basis of any valid proceeding. It is said, in the first place, that the statute does not declare in terms or by necessary implication that the use for which the property is to be taken is a public use. But this contention is plainly without merit, as the statute must be read in the light of the construction placed upon it by the state court, which has held the described use to be a public one. The judgment of the state so far as it is competent to determine the matter has thus been fully expressed." (p. 221.)

In the decision of this case (and in all cases of like nature) the highest court of the state determined two things: (1) What use, if any, is specified in the statutes under which condemnation is had, and (2) whether such use is a public use.

The decision of the first of these questions is a pure matter of statutory construction—the interpretation by the highest court of the state of the acts of its legislature, and is not subject to review upon writ of error or otherwise, but is binding upon this court in all subsequent proceedings. Any determination of constitutional questions by this court must be in the light of that construction.

(b) This Case Must Therefore be Considered by this Court With Relation to the Use Specified in the Statute as Construed by the Highest Court of the State, to wit, the Preservation and Restoration of the Property as a Place of Historical Interest, and a Memorial of the Early History of Kansas.

The following quotation from the opinion of the supreme court of Kansas shows the construction of the statute by that court:

> "The meaning of the statute is clear enough, that places invested with unusual historical interest may be acquired by the state by gift, devise, or condemnation, for the use and benefit of the state, as places of that character. If there were any doubt about this, the joint resolution and the appropriation act relating to acquisition of the Shawnee Mission interpret the eminent domain statute, and show what the legislative intention was. The State Historical Society is to be custodian of the

place. On taking it over, a qualified person is to make a survey and recommend measures for proper preservation and restoration of the Mission, and all things are to be done necessary to and consistent with use of the place by the state as a place of unusual historical interest.

"There is further indication that withdrawal from private ownership and acquisition by the state means the place thereby becomes a memorial of that which gave it unusual historical interest. . . . When some house or other building, or some place, becomes hallowed on account of its historical association, it is itself a memorial, if set free from the material uses incident to private ownership, and the two statutes are companion statutes, designed to perpetuate remembrance of that which ought not to be forgotten." (R. 64, 65.)

Summarizing the above language, the highest court of the state has held that the use for which the property is condemned is its restoration and preservation as a place of unusual historical interest and memorial to the early history of Kansas.

There is no merit in the contention that this use is inadequately described because a part of the work of restoration is deferred until the property can be examined by a board and plans made for its restoration. The state is not obliged to specify the details and ultimate cost of improvement at the time condemnation is made.

For example, land might be condemned for a state capitol without specifying whether the building should be of limestone or marble, and leaving to the architect to design a plan, and to subsequent legislatures to provide the funds for the building after the condemnation is complete.

So in this case, although we do not know whether the legislature will adopt an extensive plan of landscaping and rebuilding, or will be satisfied to preserve the property in its present condition with minor restorations, the use of the property is specified as completely as is necessary or possible.

2. The Use Specified is a Public Use.

Is the preservation, and restoration of a historical site and buildings as a historical landmark or memorial, a public use for which private property can be taken by a state under the power of eminent domain, without violation of the fourteenth amendment, provided full compensation is made?

This is and can be the only question in this case.

Full compensation is provided by law (R. 5, 6, 8) and was allowed to plaintiff in error after full hearing (R. 44, 53), and has been paid into court for her benefit (R. 54).

It cannot be questioned that a state or nation may levy taxes and appropriate moneys for historical purposes. But if this were not a public purpose, such taxation would violate private rights under the fourteenth amendment.

If a use is public so as to justify the expenditure of public moneys, it is a public use for which property may be taken by condemnation. That is, if a state can raise money by taxation for military purposes, it can condemn land for military purposes. If it can spend public money to improve highways, it can condemn land for highways. And if it can use public money for historical purposes, surely it can condemn land for the same purposes. There is nothing in the law of eminent domain restricting the term "public use" or changing its ordinary meaning.

The extensive quotation of authorities by counsel for plaintiff in error (on pages 40-59 of her brief) emphasizes the repeated expressions of this court that the words "public use" are not susceptible of exact definition. These authorities also show the trend frequently noted by this court toward a broader application of these words, to meet the changing conditions of our national life. Some of the older decisions do limit the power to cases of extreme necessity, but this doctrine has long since been expanded.

(a) To Constitute a Public Use, it is no Longer Necessary that the State Use the Property in Any Active Function of Government.

At one time lands were condemned by states and municipalities only for the carrying out of the active functions of their governments; for statehouses, jails, asylums, highways, etc. But it has now been established for many years that lands may be condemned for other purposes beneficial to the public, for parks, forest preserves, playgrounds, beaches, monuments and other æsthetic and recreational needs.

In *Shoemaker v. United States*, 147 U. S. 282, l. c. 297, Mr. Justice Shiras, speaking for this court, begins the opinion as follows:

> "In the memory of men now living, a proposition to take private property, without the consent of its owner, for a public park, and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power."

and proceeds to show that such power had come to be exercised and upheld in almost every jurisdiction.

In the thirty-six years since 1892 (when the Shoemaker case was decided) there has been still further expansion of this power. The following is quoted from Nichols on Eminent Domain (2d edition), vol. I, pp. 163-164:

> "The recognized function of parks has been gradually extended far beyond the original notion of breathing spaces in congested parts of populous cities. It is shown elsewhere that parkways, boulevards and pleasure drives may be laid out by the public authorities. Land may be taken by a city for a park outside the city limits. Vast tracts of uninhabited woodland, or spots made beautiful by nature, may be taken for state or national parks, and the whole site of a famous battle may be reserved. It is apparent that pleasure and sentiment must be the principal factors in justifying the taking of property for such purposes." See, also, pp. 161-167, same volume.

(b) The Determination of the Highest Court of a State that a Use Specified by the Legislature is a Public Use, is Entitled to Great Respect, and is Ordinarily Followed.

The supreme court of Kansas has determined two things: (1) That the statutes in question specify the use for which the property is condemned: the preservation and restoration of the Old Shawnee Mission as a place of unusual historical interest or memorial; and (2) that such use is a public use.

Upon the first of these questions, being a question of statutory construction, the decision of the highest court of the state is final and conclusive.

Upon the second question, its decision is subject to review by this court upon the sole issue of whether private rights under the fourteenth amendment are thereby violated.

While this court has occasionally reviewed decisions of state courts holding that a certain use is public, it has always given great weight to such decisions. This is best expressed by this court itself in the following case:

> "No case is recalled where this court has condemned as a violation of the fourteenth amendment a taking upheld by the state court as a taking for public uses in conformity with its laws. . . . We must not be understood as saying that cases may not arise where this court would decline to follow the state courts in their determination of the uses for which land could be taken by the right of eminent domain. The cases cited, however, show how greatly we have deferred to the opinions of the state courts on this subject, which so closely concerns the welfare of their people." (*Haairston v. Danville & Western Railway*, 208 U. S. 598, l. c. 607.)

See, also—

Fallbrook Irrigation District v. Bradley, 164 U. S. 112, l. c. 160.

Clark v. Nash, 198 U. S. 361, l. c. 367-368.

Strickley v. Highland Boy Gold Mining Co., 200 U. S. 527, l. c. 531.

Likewise, where the condemnation is by the sovereign itself (and not delegated to private corporations) the presumption that the use is public, is still stronger.

> "It is quite a different view of the question which courts will take when this power is delegated to a private corporation. In that case the presumption that the intended use for which the corporation proposes to take the land is public, is not so strong as where the government intends to use the land itself." (*United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668, l. c. 680.)

In Nichols on Eminent Domain (2d edition), vol. I, p. 143, it is said:

> "In determining whether a use for which the taking of property has been authorized is public, the character of the party exercising the power is, in a close case, of some importance, as the courts are inclined to view a proposed use more favorably if the taking is to be made by a public body." . . .
>
> "Nor is it to be overlooked in this connection that the ordinary presumption in favor of the validity of an act of the legislature is greatly strengthened in the present case by the consideration that the power to take the property of the defendants is not delegated to any persons or corporation for their private advantage and emolument who are to make compensation for the property taken out of their private capital or stock. But it is an exercise of the power of eminent domain directly by the state itself." (*Talbot v. Hudson*, 16 Gray [Mass.], 417.)

(c) The Decision of the State Courts that the Property is Taken for a Public Use is Correct.

Having shown that the decision of the highest court of the state is entitled to great respect upon the question of whether the proposed use is public, we respectfully submit that this court will reach the same conclusion from an independent consideration of the subject.

The preservation of the records of its past history has engaged the attention of every state and nation. It has always been recognized

that in governmental matters we can profit by the experiences of the past, and that the public is served by making the record of such experience readily accessible to the people generally. It is unnecessary to dwell upon this subject except to say that the appropriation of public money for what we may designate as "historical" purposes has been constantly exercised and never before questioned so far as we can find.

The distinction between preserving historical records and the acquisition of historical sites is not great where both are accomplished with the public funds. To many people a printed account of historical incidents is insufficient to give the understanding and inspiration which is obtained by the preservation of the scene of action, in as near its original condition as possible.

This brings us to this decision of this court which is directly in point and decisive of the case at bar—the case of *United States v. Gettysburg Electric Railway Company*, 160 U. S. 668.

Counsel for plaintiff in error have made heroic efforts to distinguish this case, on pages 96 to 106 of their brief. (See, also, Appendix, pp. 129-138.) Their principal contention seems to be based upon the proposition we have already discussed—their insistence that the Kansas statutes do not prescribe the use for which the property is taken. As we have shown, this is untenable because the highest court of the state, construing its own statute, has found that a use was prescribed, to wit, the preservation and restoration of the property as a historical site and memorial. This purpose also clearly appears from the statutes designating the Historical Society as custodian, providing for the survey and restoration of the property, and appropriating money for its maintenance. As we have also shown, counsel cannot ask this court to put upon the statutes a different construction in order to render it unconstitutional.

What was the proposed use in the Gettysburg case? The same

as in the case at bar. The preservation and restoration of the property as a historical site. The marking of the lines of battle was specified, because all visible signs thereof had been previously obliterated. The state of Kansas is fortunate in securing the greater part of the buildings comprising the Shawnee Mission before they have been removed or crumbled to earth under private ownership, and it could not be known before the state took possession of the property just what detailed expenditures are necessary in the way of restoration. The purpose was plainly designated by the legislature.

The question of whether such a proposed use is public in its nature is definitely settled by the following language from the opinion in the Gettysburg case.

> "Any act of congress which plainly and directly tends to enhance the respect and love of the citizens for the institutions of his country and to quicken and strengthen his motives to defend them, and which is germane to and intimately connected with, and appropriate to the exercise of some one or all of the powers granted by congress, must be valid. This proposed use comes within such description. The provision comes within the rule laid down by Chief Justice Marshall, in *McCulloch v. Maryland*, 4 Wheat. 316, 421, in these words: 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adequate to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.'
>
> "The end to be attained by this proposed use, as provided for by the act of congress, is legitimate, and lies within the scope of the constitution. The battle of Gettysburg was one of the great battles of the world. The numbers contained in the opposing armies were great; the sacrifice of life was dreadful; while the bravery and, indeed, heroism displayed by both the contending forces rank with the highest exhibition of those qualities ever made by man. The importance of the issue involved in the contest of which this great battle was a part cannot be overestimated. The existence of the government itself and the

perpetuity of our institutions depended upon the result. Valuable lessons in the art of war can now be learned from an examination of this great battlefield in connection with the history of the events which there took place. Can it be that the government is without power to preserve the land, and properly mark out the various sites upon which this struggle took place? Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle in the name and for the benefit of all the citizens of the country for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. It would be a great object lesson to all who looked upon the land thus cared for, and it would show a proper recognition of the great things that were done there on those momentous days. By this use the government manifests for the benefit of all its citizens the value put upon the services and exertions of the citizen soldiers of that period. Their successful effort to preserve the integrity and solidarity of the great republic of modern times is forcibly impressed upon everyone who looks over the field. The value of the sacrifices then freely made is rendered plainer and more durable by the fact that the government of the United States, through its representatives in congress assembled, appreciates and endeavors to perpetuate it by this most suitable recognition. Such action on the part of congress touches the heart and comes home to the imagination of every citizen, and greatly tends to enhance his love and respect for those institutions for which these heroic sacrifices were made. The greater the love of the citizen for the institutions of his country the greater is the dependence properly to be placed upon him for their defence in time of necessity, and it is to such men that the country must look for its safety. The institutions of our country which were saved at this enormous expenditure of life and property ought to and will be regarded with proportionate affection. Here upon this battlefield is one of the proofs of that expenditure, and the sacrifices are rendered more obvious and more easily appreciated when such a battlefield is preserved by the government at the public expense." (*United States v. Gettysburg Electric Railway Co.*, 160 U. S. 668, 1 c. 681, 682, 683.)

For the information of the court it should be stated that there are local conditions in Kansas, not prevailing in all of the states, which impel the preservation of historical sites by the state itself. It is well known that many historic shrines in the eastern part of the country have been preserved in private hands, by voluntary associations of wealthy persons organized for such purpose, or by private owners in a commercial manner, by charging admission and selling souvenirs and literature.

Kansas is primarily an agricultural state, sparsely settled, as compared with the Atlantic seaboard, and with comparatively few wealthy men. It is not practicable at this time for private individuals to finance the preservation and restoration of its historic spots in a commercial manner. Some efforts have been made by voluntary associations, such as the Daughters of the American Revolution (R. 69), to mark places of historical interest, but it has been found that where continual maintenance is necessary, this is best accomplished by the state. In this manner the state has previously acquired by gift or purchase the John Brown Park, at Osawatomie, Pawnee Rock, and more recently has taken over the maintenance of the first capitol of Kansas on the government reservation near Fort Riley. For these objects public money has been appropriated by the legislature of the state of Kansas for many years, without ever being challenged by a taxpayer.

Kansas was settled partly by "free-state" immigration from New England and other points in the North, and partly by "pro-slavery" settlers from Missouri and other southern states. Its territorial and early state history is composed mainly of conflict and bloodshed between these two factions. This conflict has continued with diminishing force through its later political history up to the close of the last century, and its evidences are still in existence.

The Old Shawnee Mission, founded by the Methodist Church,

was the meeting place of all factions. The acquisition and preservation of this landmark by the whole state is not only a memorial to the conflict which raged about it, but will stand as a proof that such conflict has been settled, the warring factions reconciled, and that these difficulties have passed into history.

These are some of the local conditions which were recognized by the legislature and courts of Kansas in their determination, that these lands were condemned for a public use, and such decision should be upheld.

3. Where the Use is Public, the Necessity for the Taking of Any Particular Property and the Quantity Taken Are Questions for the Legislature.

There is some indication in the brief of plaintiff in error that she questions the expediency of acquiring the Old Shawnee Mission rather than some other historic site. She also objects to the quantity of land taken, although it is not clear whether she believes the state should have taken more or less. With this in mind, we will briefly show that she cannot be heard upon these questions.

The rule is well settled that the legislature must determine the particular property to be taken and the quantity necessary to the purpose, and where the use is public, the legislative decision on these matters is final.

This rule is expressed by this court in *Shoemaker v. United States*, 147 U. S. 282, 1. c. 298, as follows:

> "The adjudicated cases likewise establish the proposition that while the courts have power to determine whether the use for which private property is authorized by the legislature to be taken, is in fact a public use, yet, if this question is decided in the affirmative, the judicial function is exhausted, that the extent to which such property shall be taken for such use rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made."

The same rule is stated in the case of *Bragg v. Weaver*, 251 U. S. 57, l. c. 58, as follows:

> "Where the intended use is public, the necessity and expedience of the taking may be determined by such agency and in such mode as the state may designate."

Therefore the question is not before this court as to whether the state should have condemned the scene of some other historical event rather than the Old Shawnee Mission. That was a question for the determination of the legislature. Neither is it for the courts to say that the state should have taken five acres or fifty acres, instead of twelve acres. As a matter of fact, several sections of land were owned, occupied and cultivated by the Mission in early days, but the legislature found it expedient only to take all of the buildings which now stand and a small amount of land around each. This was within the legislative discretion.

4. Plaintiff is Not Deprived of Her Property Without Due Process of Law by Reason of Any Uncertainty as to the Use to Which the Property Would Be Put.

The second contention of plaintiff in error is based upon the same erroneous assumption as the first, to the effect that the statutes in question did not prescribe a definite use to which the property would be put. As before stated, this is concluded by the decision of the highest court of the state, construing its own statutes, and holding that they did specify a definite use: the restoration and preservation of the property as a historical site or memorial.

At no stage of the proceedings was plaintiff in error left in any doubt as to the intentions of the state in regard to the use of the property. Her apprehension was that the state would not spend enough money upon it to restore it according to her ideas. Incidentally this contention came with very poor grace from plaintiff in error, who had owned for many years the building upon the north

side of the road, and permitted it to get in such delapidated condition that it was in imminent danger of falling down. (R. 45.)

The following quotation from the answer filed by Katherine C. Roe shows that she was given and availed herself of full opportunity to plead any prospective damages to her remaining lands:

> "12. Answering defendant has already arranged for the platting of her entire tract of land to be sold for residence purposes under restrictions which will make it extremely valuable for high-class and expensive dwelling houses and for a restricted residential district to which, but for the appropriation contemplated by this proceeding, it was peculiarly adapted, but on account of the appropriation of said 7½ acres thereof for public purposes, making a public park within ⅝ of a mile from the corporate limits of two cities, one in Missouri and one in Kansas, and therefore beyond the police jurisdiction of those cities, and fifteen miles distant from the county seat of Johnson county, rendering policing by the sheriff practically impossible, will destroy all the value of the restrictions and residential purposes of the remaining portion of the defendant's land. Said land will become a resort for pleasure seekers, tourists, picknickers, joy riders and the like on all occasions, night and day, without police restrictions, and will materially lessen and practically destroy the value of the defendant's remaining land, and the defendant will sustain damages to her remaining land in the sum of at least $1,000 per acre, or in the aggregate of $161,500." (R. 22, 23.)

It will be noted that plaintiff in error was not in doubt as to the use for which her property was taken at the time she filed the above answer. Incidentally, it was nowhere claimed in her answer that no use was specified, or that the property was not taken for a public use.

Also, her counsel was not in doubt about the prospective use as shown by his statement in the trial court (R. 32):

> "It is purely a matter wherein the state, imbued with the idea that something ought to be preserved because of its past—not because of its present value, nor of its future value—but it ought to be preserved because of the past.
>
> "I am objecting to any proceeding on the matter at all be-

> cause it is an attempt to take private property for a use which is not public, *that use being one merely to preserve a relic, because of its past value*, not because of its present value or future utility; and therefore falls completely outside of the constitutional or conventional definition of the words, 'public uses.'"

Since the above statement was made by counsel before any evidence was introduced on the questions of compensation and damages, it is clear that plaintiff in error knew before she was put on her defense that the intention of the state was to preserve the property. The cause went to trial upon her answer, and she was given full opportunity and did offer proof thereon. She did not bring the evidence to the supreme court of Kansas or to this court, and cannot now raise any question concerning it.

5. The Statutes Are Not Rendered Invalid by the Leasing Provisions.

On pages 91 to 93 of her brief, plaintiff in error attacks a particular provision of the statute concerning leases. This is section 8 of chapter 7, Laws of 1927 (R. 101), as follows:

> "SECTION 8. If at the time the said real estate is reduced to the possession of the state of Kansas any of the buildings thereon are occupied by any person holding a valid lease thereon from any of the former owners, the said board may, in its discretion, and with the approval of the governor, permit such tenants to remain on the said premises for the period of such lease or a part thereof, upon the payment to the state of Kansas of the same amount of rents payable under such lease to the former owners thereof; and all sums received from such rents, and any moneys received by gift shall be deposited in the state treasury and are hereby reappropriated to the said board for the purpose herein set out."

It is apparent that the above provision was inserted in the statute in order to avoid any harsh treatment of lessees whose business might be interrupted by the condemnation. Discretion was lodged

in the board to permit any lessees to remain on the property for all or a part of the remaining terms of their leases. The board is given no power to make new leases, and there is no justification whatever for the statement of counsel on page 105 of the brief of plaintiff in error (referring to the Gettysburg case):

> "There was nothing in these acts of congress which gave any future officer or board the power to rent the land out and to assume the rôle of a governmental landlord as in *the case at bar*."

This statement, while probably inadvertent, is an unwarranted contortion of the statute, which gives the board no power whatever to rent the land out, but only the discretion to recognize existing leases.

Neither was the board required to recognize existing leases, but the leasehold might be condemned and paid for along with the fee title to the property. This is exactly what was done in this case. One lease was found on tract No. 1, but the board did not deem it expedient to continue that in effect, and the leasehold was condemned and paid for to the apparent satisfaction of the lessee, who accepted the proceeds and did not appeal even to the supreme court of Kansas. (R. 44.)

There were no leasehold interests in the lands of plaintiff in error, and the provision above referred to did not affect her in the least. (R. 52, 53.)

The propriety of leasing property taken under eminent domain, where such leasing is incidental to the main purpose, has been recognized by this court in the case of *United States v. Chandler-Dunbar Company*, 229 U. S. 53, 73, 72-74.

6. Plaintiff in Error Has No Interest in the Lands of Lincoln and Lee University, and Cannot Defeat Their Condemnation.

A part of the land condemned, designated as tract No. 3, was deeded by Katherine C. Roe to Lincoln and Lee University of Kansas City, immediately prior to the condemnation. Certain conditions subsequent were inserted in this deed, with a reversion to the Haskell Institute for Indians in case these were not carried out. No interest or reversion was retained by plaintiff in error. (R. 25-27.) Nevertheless in these proceedings she persistently attempted to defeat the condemnation of this tract, and claimed the proceeds thereof. (R. 24, 56.) Lincoln and Lee University opposed the condemnation in the district court, but did not appeal from the decision. (R. 27-30.) Katherine C. Roe appealed to the supreme court of Kansas, both from the condemnation of tract No. 4 theretofore owned by her, and of tract No. 3 owned by Lincoln and Lee University, and brought the University into the supreme court of Kansas, as appellee. (R. 62.)

The supreme court of Kansas held that plaintiff in error had no interest in tract No. 3, or its proceeds, in the following language:

> "Condemnation by the state of the land deeded by Miss Roe to Lincoln and Lee University discharged performance of the condition subsequent inserted in the deed, and the University is entitled to the award of damages for that land. If this were not true, by the same deed Miss Roe disposed of the reversion, and she has no interest in the land or the condemnation money." (R. 70.)

This decision is undoubtedly correct, and no specification of error is directed against it. Therefore, the private rights of Katherine C. Roe, under the constitution of the United States or otherwise, are not affected by the condemnation of tract No. 3, and she has no grounds for invoking the jurisdiction of this court with reference to that tract.

V.

Conclusion.

We respectfully submit that the condemnation by the state of Kansas of the real estate in question, comprising all the historic buildings which still stand of the Old Shawnee Mission, was regular in every respect; that the statutes adequately specified the use for which the property was taken, to wit, its preservation and restoration as a historical site or memorial; that such use is a public use; and that the plaintiff in error, Katherine C. Roe, was accorded due process of law at every stage of the proceedings, and none of her rights under the constitution of the United States were violated.

We further submit that the plaintiff in error, having no interest in the lands of Lincoln and Lee University (designated as tract No. 3) cannot maintain these proceedings in error to prevent the condemnation thereof.

We further submit that the entire record in this case not only shows a compliance with the federal constitution, but that full justice was done to all parties concerned, and that the judgment should be affirmed.

Respectfully submitted,

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